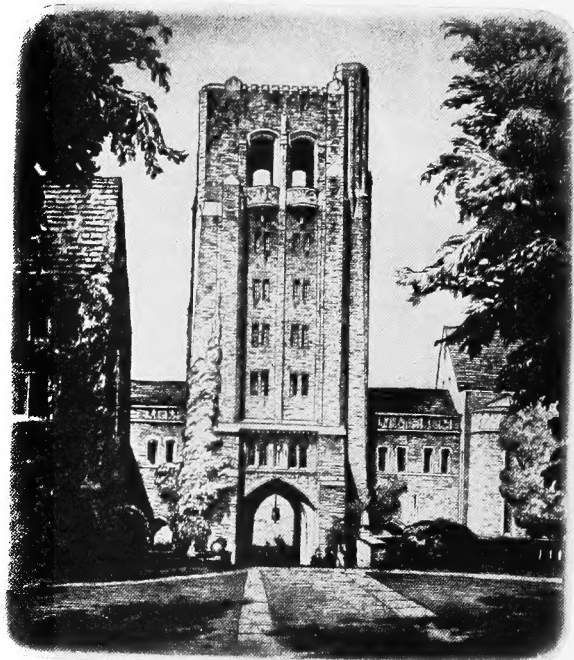


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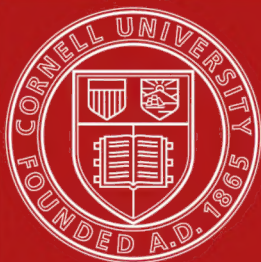


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PRACTICE
IN
SPECIAL PROCEEDINGS

IN THE
COURTS OF RECORD
OF THE
STATE OF NEW YORK
UNDER THE
CODE AND CONSOLIDATED LAWS, WITH FORMS.

BY
J. NEWTON FIERO, LL.D.,
DEAN OF THE ALBANY LAW SCHOOL.
Author of "Torts and Special Actions."

IN TWO VOLUMES.
VOL. I.

THIRD EDITION.



ALBANY, N. Y.
MATTHEW BENDER & COMPANY.
1912.

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PREFACE TO THIRD EDITION.

The thirteen years which have elapsed since the second edition have been fruitful of decisions upon the subjects treated in these volumes, and this fact together with the consolidation of the statutes has rendered it desirable to rewrite the work and rearrange it in the cyclopedic form which met with hearty approval in the third edition of the Special Actions.

Something over 200 volumes of official reports have been issued during that period, viz.: 47 volumes of New York, 108 volumes of Appellate Division and 47 volumes of Miscellaneous. The text of the work is brought down to and includes 202 N. Y., 144 App. Div. and 72 Misc. The Code and Statutes are brought down to the opening of the legislative session of 1912. The precedents have been thoroughly revised and in most cases later ones substituted for those in the former volumes—only those being retained which were adapted from leading cases and for that reason recognized as standards.

The first edition contained 745 pages, the second edition 1,566 pages. The present edition, by condensation of authorities and omission of precedents in cases where printed forms can be readily obtained, as in summary proceedings and supplementary proceedings, and by reason of the largely increased size of the page, has with difficulty been kept within the limit of 2,075 pages.

It will be noted that in the consolidation many of the proceedings have been transferred from the Code to the Statutes. In such cases tabular statements are made indicating the former Code section and the statute and section where now found. The cyclopedic arrangement will be found to facilitate the work of investigation in that each of the unconnected topics will be found in its alphabetical order. To this an exception is made in treating "Special Proceedings Generally" which is introductory in its nature and therefore precedes the specific topics ranged under that general title.

Acknowledgment is due and very cheerfully tendered to Hon. Ledyard P. Hale, counsel to the Public Service Commission, Second District, for most valuable advice and assistance in connection with precedents in use by that Commission, and to Louis M. Martin and Wilber W. Chambers, who have, as Deputy Attorneys-General, been in charge of that department, for selection and revision of precedents in proceedings for Voluntary Dissolution of Corporations.

J. NEWTON FIERO.

ALBANY, *March* 15, 1912.

PREFACE TO SECOND EDITION.

SINCE the first edition of this work was published in 1887, there have been issued more than fifty volumes of the Court of Appeals Reports, being one-third of the whole number published, and more than eighty volumes of the Reports of the General Terms and Appellate Divisions of the Supreme Court. On many of the more important subjects the number of decisions has more than doubled in the eleven years that have elapsed since the first publication, as notably in the case of *Mandamus*, *Habeas Corpus*, *Certiorari*, Contempt, and, to a somewhat less extent, Supplementary Proceedings. In the meanwhile other subjects have attained such importance as to demand treatment in a work of this character attempting to give a complete system of Practice in Special Proceedings. New chapters are devoted to Proceedings under the Tax Law, in the Court of Claims, under the Election Law, and several other topics. The passage of the Condemnation Law has changed the practice and resulted in numerous decisions, while the statute changing References of Claims against Estates from a Special Proceeding to an Action has removed that proceeding from the scope of this work. The Special Actions, first published in 1888, passed through a second edition in 1897, and has become familiar to the Bar of the State, and the same plan as to arrangement and treatment has been followed here which proved convenient and satisfactory in that work.

In the preface to the first edition, I expressed a hope and expectation that the work would be "of service to my brethren of the Bar." The hearty recognition which has been accorded to it, now justifies me in assuming that fact as a sufficient warrant for a new edition bringing the Code, Statutes and authorities down to January 1st, 1899.

J. NEWTON FIERO.

ALBANY, N. Y., April 10, 1899.

PREFACE TO FIRST EDITION.

THE lapse of more than twenty years since the appearance of a treatise on the subjects discussed in this volume seems to render any explanation of the motives for this publication entirely unnecessary.

In addition to that fact, however, it may be noted that by the enactment of chapters 14 to 29 of the Code, taking effect in 1880, many and radical changes were made in the conduct of special proceedings, then for the first time codified. In the meantime, too, many of the remedies like *Certiorari*, *Mandamus*, General Assignments, and Proceedings to Acquire Lands for Railroad Purposes have gradually grown in importance, and the body of authorities on all the subjects treated is nearly, if not quite, twice as great as at the time of the issue of the last text-book in which they are considered.

As a matter of convenience to the profession, and to avoid examination of the separate volume, or reference to other portions of this volume, the Code or Statute on each subject is followed by a citation of authorities, and forms are given in the body of the text, enabling the practitioner to examine the legislative enactment as construed by the courts and to consult the precedents connected with both, with the least possible labor.

In case criticism should be made that the course of procedure as given in many instances is not orderly or logical, it can only be said that the arrangement of the Code and Statutes in that respect has been strictly followed as the only safe method, even though it may have resulted in stating the practice on appeal in a matter, before providing for the commencement of the proceeding.

The plan of the work includes all the special proceedings provided for by the Code of Civil Procedure, sections 1991 to 2471 inclusive, and in addition treats general assignment, reference of claims against estates, proceedings for sale of real estate of

religious corporations, and proceedings to acquire title to lands for railroad purposes, as provided for by statutory enactment.

The classification made by the Code reduces very largely the number of what were at one time classed as special proceedings excluding partition, foreclosure, mechanics' liens, and numerous other subjects heretofore treated as such, and now regarded as actions.

By reason of that fact, and by condensing the text so far as was possible without affecting clearness and accuracy, and by giving full pages of matter, the work has been confined to a single volume without sacrificing any substantial benefits, although the authorities cited include all the State Reports up to 44 Hun, 8 St. Rep., and 104 N. Y. R.

If, as has been said, every lawyer owes it to his profession to write a book, my duty in that respect is discharged, and it remains for the profession to determine whether its merits constitute a sufficient reason for its existence. The fact that it was written during hours snatched from active practice is no excuse for shortcomings, and if it does not meet the demands of the profession, it will richly deserve that condemnation which it will be certain to receive at their hands. While, if it prove of service, I need not bespeak a hearty recognition of that fact from my brethren of the profession, for whose benefit it was prepared and to whose criticism it is submitted.

J. NEWTON FIERO.

KINGSTON, *October 1, 1887.*

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SPECIAL PROCEEDINGS

UNDER THE

CODE OF CIVIL PROCEDURE AND STATUTES.

SPECIAL PROCEEDINGS GENERALLY CONSIDERED.

SCOPE OF THE WORK.

These volumes treat of the proceedings which are "special" whether provided for by the Code or statutes in so far as the more important proceedings are concerned, but it is obviously impossible, as well as unnecessary, to treat of *every* special proceeding since every prosecution other than such as are defined to be "actions" are special proceedings under section 3334.

The Code, title II of chapter XVI, provides for special proceedings instituted by State writ and enumerates and regulates the procedure under these writs, sections 1991-2148.

Chapter XVII is entitled "Certain Special Proceedings Instituted Without Writ," sections 2149-2471a. As to the matters thus enumerated there is no question that they are "special proceedings," and to be so considered for all purposes.

Several of the topics included in these chapters have been transferred by the Consolidated Laws to other statutes, viz.: Proceedings with reference to insolvents, including the statute as to general assignments, have become part of the Debtor and Creditor Law; The provisions to care for a prisoner's property, to the Prison Law; contempt proceedings and proceedings to collect a fine, to the Judiciary Law; proceedings for change of name and for voluntary dissolution of corporations, to the General Corporation Law; the section as to delivery of public books and papers, to the Public Officers' Law; proceeding for the sale of corporate real property has gone to the General Corporation Law and Joint Stock Corporation Law, but these changes in no wise affect their classification as special proceedings.

The Code, in addition to these chapters, also provides by supplemental provisions, chapter XXII, sections 3357-3384, the method for condemnation of real property. This is a special proceeding as uniformly held by the courts, although entitled as in form as an

action, but not commenced by service of a summons or conducted as an action.

In addition to these proceedings, specifically classed as special, the courts have in very many instances directly passed upon the question as to whether the controversy then before the court should be regarded as within the Code definition of what constitutes a special proceeding.

The special proceedings, however, provided for by the Criminal Code, sections 773-952, are not within the scope of this work. All proceedings in Surrogate's Court are "special proceedings" as distinguished from "actions" and no attempt is made to treat the procedure in that court except incidentally where it has concurrent jurisdiction with the Supreme Court.

The matters pertaining to the subject generally — definitions of a special proceeding — what are special proceedings — costs and appeals therein, are fully treated under the title "Special Proceedings Generally Considered," and each topic is also separately treated in its alphabetical order.

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Section 860 of the Code has been transferred to the Consolidated Laws, Tit. Civil Rights Law, § 25.

ARTICLE I.

SPECIAL PROCEEDINGS DEFINED. §§ 3333, 3334, 3343, subd. 20.

- § 3333. *Definition of "action,"* 4.
 § 3334. *Id.; "special action,"* 4.
 § 3343, subd. 20. *Miscellaneous general definitions and rules of construction,* 5.

§ 3333. Definition of "action."

The word "action," as used in the new Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3334. Id.; "special proceeding."

Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

§ 3343. Miscellaneous general definitions and rules of construction.

In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

Subd. 20. The word, "action," refers to a civil action; the word "judgment," to a judgment in such an action; the term, "special proceeding," to a civil special proceeding; the word, "order," to an order made in such an action or special proceeding; the words, "an action of ejectment," to an action to recover the immediate possession of real property.

Mr. Hepburn, says in substance, in his "Cases on Code Pleading" (p. 83): An occasional departure by the Codes from their general principle of one form of action was to be expected. The novel or peculiar nature of some substantive rights may naturally be reflected in statutory proceedings specially designed for their enforcement or protection; *ex parte* or noncontroversial proceedings also may as naturally result in peculiar forms of procedure. Such exceptions appear in all the Codes. For these exceptions the name given by the New York Act of 1848 and several other Codes, the name of "special proceedings," has come into very general use; and, as in these Codes, such proceedings are commonly grouped as a sole co-ordinate class with "actions." Whether so named or not, the two classes are separated by a line which is often arbitrary, sometimes faintly drawn, and sometimes of little moment. There are, however, cases in which the distinction is of high consequence. The rules of practice differ, more or less, in regard to motions and orders, depositions, amendments, the service of papers, etc., as the suitor brings a civil action or a special proceeding, but in some States, at least, much more substantial differences exist between the two classes—as in the right of appeal, the application of the Statute of Limitations.

The tendency of late years, however, both in Code legislation and Code decisions, is evidently toward an assimilation of the special proceeding with the civil action. The commissioners who framed the New York Revised Statutes of 1876 made it their rule to convert the most important special proceedings into actions if this could be done conveniently; when such a course was not open, the provisions which had embraced the civil action alone were applied, as far as practicable, to special proceedings.

The earlier Codes generally did not seek to bring the great writs of mandamus, prohibition, certiorari, habeas corpus, and quo warranto within the definition of the civil action, but left them with other proceedings, as they were.

The term "special proceeding" is used in contradistinction to "action"; it may be said generally that any action in a court

which was not, under the common law and equity practice, either an action at law or a suit in chancery is a special proceeding. The phrase "special proceeding," within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. *Am. & Eng. Enc.*, vol. 26, p. 1.

The criterion must be whether it is commenced as the Code declares an action shall be commenced and is between parties, with issues presented by the pleadings which the Code requires in actions. If it is of such a character the proceeding is an action; if not, and yet a remedy and not a mere proceeding in an action, it is a special proceeding. "*Cyc.*," vol. 1, p. 721.

The term "special proceeding" was employed in the Revised Statutes before the enactment of the Code and was evidently intended to designate all those which could not with propriety be classed in the ordinary proceedings in an action. In such a sense they are properly designated as special, that is, out of the ordinary course. *Holstein v. Rice*, 15 Abb. Pr. 307.

Remedies are divided by the Code into actions and special proceedings. An action is defined as an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and then declares that "every other remedy is a special proceeding." *In Matter of Petition of Jetter*, 78 N. Y. 601, 605, rev'g 14 Hun, 93.

Jessup's Surrogate's Practice, page 62, differentiates a special proceeding from a civil action, as follows:

"A civil action must begin with a summons. By its issuance the court may acquire a divestible jurisdiction for purposes of provisional remedies but by its *service* on the other party the action is said to be commenced. *Code Civ. Pro.*, § 416. Thus the party seeking relief brings the other into a court of justice by his own act alone. This is not true of a special proceeding. The party seeking relief in such a proceeding applies to the court which by *its* citation or by *its* order to show cause brings the other party before it." This is literally true only as to special proceedings in Surrogates Court.

A civil action is defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, or for the redress or prevention of a wrong. Every other civil remedy is defined to be a special proceeding. An action is commenced by the service of a summons, 11

some one of the modes prescribed by law, and it is plain that no proceeding can be an action unless it be such that it can be commenced by the service of summons on the opposite party; and pleadings — that is, the allegations of the cause of action on the one side, and, unless there be default, of the defense upon the other — are incidents to every action. *Roe v. Boyle*, 81 N. Y. 305 (306), cited in *Matter of Rafferty*, 14 App. Div. 56.

The words "cause or matter" in section 46 were intended to refer only to actions or special proceedings in which a judge might sit or take part, the word "cause" meaning a cause of action, and the word "matter" referring only to some judicial matter or proceeding and under the Code is included in special proceedings for the enforcement of civil rights. So, generally, has the word "matter" been regarded as descriptive of a special proceeding, that in entitling a proceeding of that character the word "matter" is employed. A judge or justice cannot, as such, sit in or take part in the judicial decision of any matter which is not either an action or special proceeding, as all legal proceedings are included in one or the other. *Keffe v. Third National Bank*, 177 N. Y. 305, 310.

Kennedy, J., in *Hallock v. Bacon*, 21 Civ. Proc. 255, says that the definition of special proceedings in the Code is sufficiently broad to include every possible case coming within it, whether the right of the party is created by the Revised Statutes or the Code itself.

What is a special proceeding is considered in *Matter of Cooper*, 22 N. Y. 67. The court holds that as the proceeding could not by any possibility be an action, it is a special proceeding, provided it is a remedy at all. Johnson, J., in *Belknap v. Waters*, 11 N. Y. 477, 478, says: "It appears that by 'ordinary proceedings' was intended to designate those ordinary proceedings which are instituted by a summons and complaint when they are of a civil nature. The Code, unfortunately, has not furnished us with a definition of a remedy, except in so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or for an order as a remedy. According to this interpretation, which I deem just, the application of the appellant to the Supreme Court was clearly a remedy. If we take the definition of the word 'remedy' given by lexicographers the result is the same. Bouvier defines a remedy to be 'the means employed to enforce a right or redress an injury.'"

It is said in *Matter of Lima, etc., Railway Co.*, 68 Hun, 253,

that a motion is defined by sections 767 and 768 of the Code, and per Dwight, P. J., it is *held*: "By that definition the order is a direction of the court or judge made in an action or special proceeding, and the application for such order is a motion. This, we think, indicates the characteristic which distinguishes a motion as an application in a proceeding, namely, that a motion is an application in a proceeding by action or otherwise already pending, or about to be commenced, upon which it depends for jurisdiction. Whereas the special proceeding is an independent prosecution of a remedy in which jurisdiction is obtained by original process. . . . A special proceeding is the prosecution of a remedy by original process, and independently of any other proceeding, which is opposed to the definition of a motion." Citing *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of Jetter*, 78 N. Y. 601; *Matter of Long*, 39 St. Rep. 892; *Matter of Holden*, 126 N. Y. 589.

In *Matter of Gibson*, 195 N. Y. 466 (469), it is said that there can be no judgment in a special proceeding because a special proceeding is terminated by an order and not by a judgment.

A proceeding is not an "action" as that word is used in the Code of Civil Procedure. Indeed, no such thing as "a proceeding" is known to the Code of Civil Procedure; there is a "special proceeding," and a "special proceeding" would imply that there was a legal controversy existing between the parties as to the same cause, but "a proceeding" is defined by Webster as the "act of one who proceeds, or who prosecutes a design or transaction; progress or movement from one thing to another; a measure or step taken in a course of business; a transaction," etc., so that a declaration of demurring defendants that "there is a proceeding other than this action pending between the same parties for the same cause," presents no possible question of law, for the proceeding might not be anything more than a negotiation between the parties in reference to the same matter. *Queens County Water Co. v. O'Brien*, 131 App. Div. 91 (96).

Ingraham, J., in *McLean v. Jephson*, 26 Abb. N. C. 40, 13 Supp. 834, refers to the provisions of Code of Civil Procedure, section 3333, defining an action, and also the succeeding section, 3334, providing "That every other prosecution by a party for either of the purposes specified in the last section is a special proceeding." He then calls attention to the fact that section 416 provides that a civil action is commenced by the service of a summons, and holds that

the proceeding in question not having been commenced by the service of a summons was not an action, but that it was a prosecution in a court of justice by a party against another party for the enforcement of a right and therefore is a special proceeding within the provisions of the section defining such proceedings.

The note in that case states very clearly and fully the distinction between action and civil proceedings, stating that the distinction is very well understood but that "Practically the only difficulty in the distinction is introduced by our complex statutes which have half obliterated the lines between them, by transformations from one category into another and back again. Even this would be of little importance, were it not that there are some very substantial differences between our rights in prosecuting an action, and our rights in prosecuting a special proceeding.

"The ordinary proceedings in an action sometimes branch out into a special proceeding, and in pursuing that branch the practitioner must not forget that he has crossed the line of demarcation.

"On the other hand there are a number of special proceedings which at one stage of another are, so to speak, transmuted into actions, or subjected to the regulations applicable to actions, by reason of special provisions of statutes which, with the innocent intention of simplifying the practice, declare, sometimes in one form and sometimes in another, that a special proceeding shall be from such a point, or in such a respect subject to the provisions regulating actions."

As illustrating the manner in which proceedings in an action become special proceedings, attention is called to the proceedings to punish for contempt which were provided for by section 2273 of the Code, but now contained in sections 760 and 762 of the Judiciary Law, where a distinction is made as to the manner of carrying on contempt proceedings as between an order to show cause and warrant of attachment, it being specially provided that the warrant of attachment begins an original special proceeding. Supplementary proceedings were formerly proceedings in the action for the enforcement of the judgment by the Code, section 2433, but it is provided that each of the three different remedies in proceedings supplementary to the execution against property is a special proceeding. Illustrations of the manner in which special proceedings are assimilated to and carried on in the same manner as actions, are the trial of an issue of fact in mandamus, section 2082, and proceedings after return where an alternative writ has been issued in pro-

hibition, section 2099. By section 1281 provision is made for the entry of judgment upon the submission of a controversy upon admitted facts.

Very many of the provisions of the Code with regard to actions are applicable to special proceedings, such as the Statute of Limitations, section 414. Costs are allowed as in actions, where allowed at all, unless otherwise expressly provided, section 3240.

Motions in special proceedings are brought on in substantially the same manner as in actions, by order to show cause or upon notice; State writs must be served in the same manner as a summons, section 1999; on the other hand the authority to take depositions of witnesses for use upon trial seems to be confined to actions, section 870, and so as to the right of discovery of books and papers, section 809, except as special provision is made for these matters in proceedings in Surrogate's Court.

For further citations as to what constitutes a special proceeding, see articles III. and V.

ARTICLE II.

GENERAL PROVISIONS OF THE CODE RELATING TO THE SUBJECT.

§§ 25, 26, 37, 44, 52, 53, 340, subd. 4, 342, 348, 414, 433, 716, 815, 825, 867, 1688, 1777, 1814, 1900, 2517, 3316, 3352, § 25 Civil Rights Law (formerly § 860, Code of Procedure).

Subd. 1. Jurisdiction in special proceedings, 11.

§ 340, subd. 4. *Jurisdiction, 11.*

§ 342. *Action, etc., wherein county judge is incapable to act, 11.*

§ 348. *When jurisdiction, etc., coextensive with Supreme Court, 11.*

Subd. 2. When proceeding does not abate, 13.

§ 25. *No discontinuance by reason of vacancy, etc, 13*

§ 26. *In New York, one judge may continue proceedings commenced before another, 13.*

§ 37. *Causes tried elsewhere than at court-house, 13.*

§ 44. *No action or special proceeding abated, etc., by failure of adjournment of court, 13.*

§ 52. *Substitution of one officer for another in special proceedings, 13.*

§ 53. *Proceedings before substituted officer, 13.*

Subd. 3. Statute of Limitations in special proceedings, 16.

§ 414. *Cases to which this chapter applies, 16.*

§ 2517. *Id.; within the Statute of Limitations, 16.*

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§ 433. *Service of process, etc., to commence a special proceeding, 18.*

716. *Certain receivers may hold real property, 18.*

815. *Bonds, etc., not affected by change of parties, 18.*

825. *Papers in special proceedings; where to be filed, 18.*

25. *Civil Rights Law. Witness exempt from arrest, 18.*

867. *Production, etc., of book of account, 19.*

§ 1688. *When special proceeding to recover real property not allowed, 19.*

- § 1777. *Misnomer, when waived*, 19.
- § 1814. *Action, etc., by and against executor, etc., to be brought in representative capacity*, 19
- § 1900. *Action for suing, etc., in name of another, made also a misdemeanor*, 19.
- § 3316. *Juror's fees in special proceedings*, 19.
- § 3352. *Effect of this act, upon proceedings taken, or rights accrued, etc., under former statutes*, 20.

Subd. 1. Jurisdiction in Special Proceedings. §§ 340, subd. 4, 342, 348.

§ 340. Jurisdiction.

The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provision:

4. To the custody of the person and the care of the property, concurrently with the Supreme Court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; or imbecility arising from old age or loss of memory and understanding or other cause; and to every special proceeding, which the Supreme Court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person, or for the sale or other disposition of the real property situated within the county of a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant; or for the sale or other disposition of the real property, situated within the county, of a domestic religious corporation.

§ 342. Action, etc., wherein county judge is incapable to act.

If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the Supreme Court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the Supreme Court within the same judicial district. The Supreme Court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the Supreme Court. Thereupon the subsequent proceedings in the Supreme Court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.

§ 348. When jurisdiction, etc., coextensive with Supreme Court.

Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power, and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case, and may enforce its mandates in like manner as the Supreme Court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the Supreme Court possesses, in a like action or special proceeding, brought in the Supreme Court.

The provision of the Constitution, article VI, section 14, that the jurisdiction of the County Court "shall not be extended so as to authorize an action therein in which a person, not a resident of the county, is a defendant" has no application to a special proceeding. *Matter of Folts St.*, 18 App. Div. 568, 46 Supp. 43.

Where a special proceeding is pending before a County Court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be heard before a justice of the Supreme Court, but should make and file with the county clerk a certificate of disqualification. A proceeding pending in a County Court cannot be continued before a justice of the Supreme Court, but must be removed into the Supreme Court. *Matter of Village of Rhinebeck*, 19 Hun, 346. It was held before the Code that where a county judge was interested, he might request another county judge to hold the court. *Matter of Ryers*, 10 Hun, 93.

Section 342 of the Code of Civil Procedure, which provides that if a county judge for any cause is incapable of acting in a special proceeding pending before him a certificate to that effect shall be made, relates to the transferring of such proceeding for disability to some justice of the Supreme Court within his judicial district. *Matter of Munger*, 10 App. Div. 347. The provisions of sections 52 and 53 of the Code of Civil Procedure seem to contemplate, in case of inability on the part of the county judge to act, that the proceeding shall be transferred to a like officer in an adjoining county, who shall proceed thereon as though the proceeding were originally brought in his own jurisdiction. *Matter of Munson*, 95 App. Div. 23.

Where a judge has made an order to show cause in a proceeding which he is incompetent to hear on account of being an interested person, and has afterward resigned, the matter is not properly in court for determination by his successor in office. *In re Reddish*, 18 St. Rep. 41, 2 Supp. 259.

A county judge cannot make an order relating to the care, custody, or control of infants. *Williams v. Corey*, 46 Hun, 408; *People v. Parr*, 49 Hun, 473, 2 Supp. 263, 18 St. Rep. 315; *aff'd*, 121 N. Y. 679.

The jurisdiction of the County Court is conferred by statute and it extends to the custody of the person and the care of the property concurrently with the Supreme Court, of a resident of the county who is incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness. *Matter of Clark*, 175 N. Y. 139.

Subd. 2. When Proceeding Does not Abate. §§ 25, 26, 37, 44, 52, 53.**§ 25. No discontinuance by reason of vacancy, etc.**

An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the reelection or re-appointment of a judge; but it must be continued, heard, and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do, by the court in which the action or special proceeding is pending.

§ 26. In New York, one judge may continue proceedings commenced before another.

In the counties within the first and second judicial districts, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of a court, in an action or special proceeding pending in a court of record, may be continued from time to time, before one or more other judges of the same court, with like effect, as if it had been instituted or commenced before the judge, who last hears the same. (See § 771.)

§ 37. Causes tried elsewhere than at court-house.

The parties to an action or special proceeding, pending in a court of record, may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it shall be tried or heard and determined, elsewhere than at the courthouse. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk; and the trial or hearing must be brought on upon the usual notice, unless otherwise provided in the stipulation.

§ 44. No action or special proceeding abated, etc., by failure or adjournment of court.

When a term of a court fails or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held, as originally appointed.

§ 52. Substitution of one officer for another in special proceeding.

In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom or in whose court a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county or in case such officer be disqualified, then before an officer in an adjoining county, who would originally have had jurisdiction of the subject matter, if it had occurred or existed in the latter county; and in case such special proceeding be pending in a county court and the county judge of the county be disqualified to hear and decide the same, then in such case all further proceedings therein may be had in the county court of any adjoining county, which court shall have jurisdiction to hear, try and determine the same and to enforce its order.

§ 53. Proceedings before substituted officer.

At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the

notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before another, may act, with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place, other than that specified in the original notice or order, until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication in such manner and for such time as the substituted officer directs, to each party who may be effected[†] thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial day, each day to which it is so adjourned, is regarded, for the purposes of this section, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.

The trial of an action was commenced before Mr. Justice Pratt on October 7, 1877, and continued until January 26, 1878, testimony being taken at various intermediate dates. The term of office of Mr. Justice Pratt expired December 31, 1877, but having been re-elected he commenced a new term January 31, 1878. No objection was made to proceeding with the trial by any of the parties at the time. *Held*, that no objection to the regularity of the proceedings could be raised after judgment therein. *Kelly v. Chrystal*, 16 Hun, 242; *aff'd*, without passing on this point, 81 N. Y. 619.

The provision of section 25 empowering a judge out of office to settle a case and exceptions or make a return of proceedings before him while in office does not enable him to decide an issue or motion; nor do the provisions of section 26 authorizing the continuation of certain proceedings commenced before one judge of the County Court of New York or Kings before another judge of the same court. That relates to a proceeding before a judge out of court and has no application to an issue or motion in an action or special proceeding heard by the court; nor does section 52, which provides that "in case of the death, sickness, resignation, or other disability of an officer before whom a special proceeding has been instituted, it may be continued before his successor." *Matter of Mayor of New York*, 139 N. Y. 143, *dist'g Kelly v. Chrystal*, 16 Hun, 242, and *aff'g Matter of Mayor*, 69 Hun, 271.

It was held, of a provision similar to section 26 under the old Code, in Superior Court, that a proceeding commenced in the first judicial district by any judge competent to institute it therein, might be continued in such district before any other judge competent to have commenced it. *Dresser v. Van Pelt*, 15 How. 19, 6 Duer, 687.

The application of a sheriff to fix the fees in an attachment case is a continuation of the attachment proceeding, and the hearing could, in New York city, be had before a judge other than the one who issued the attachment, by virtue of this provision. *Woodruff v. Imperial Fire Insurance Co.*, 90 N. Y. 521.

An order made by a judge of the City Court of the city of New York for the examination of a judgment debtor, in proceedings supplementary to execution upon a judgment obtained in a municipal court, may only be vacated or modified by a judge of the City Court or, under section 2435, upon motion in the Supreme Court if the execution was issued therefrom. *McAlpin v. Stoddard*, 54 Misc. 647.

Proceedings to vacate an assessment are special proceedings which abate on the death of the petitioner, and cannot be revived in the name of their administrators or executors. *In re Barney*, 53 Hun, 480, 6 Supp. 401, *In re Marshall*, 55 Hun, 606, 7 Supp. 861, *In re Roberts*, 53 Hun, 338, 6 Supp. 195. (See amendment to section 755 made in 1891.)

A like rule was held in *Matter of Palmer*, 115 N. Y. 493, previous to the amendment of 1891. The right to revive and continue undetermined special proceedings in the name of or against the administrator of a deceased party depends entirely upon statutory authority.

Proceedings supplementary to execution under an order for the examination of a judgment debtor made by a judge of the City Court of the city of New York may be continued before another judge of the same court. *Matter of Morrison*, 49 Misc. 464.

An order for the examination of a judgment debtor in proceedings supplementary to execution, made by a justice of the City Court of the city of New York, a short time before his resignation, is sufficient to require the judgment debtor to attend before his successor in office sitting at the same term of the court and at the time and place designated in the order. *Dodge v. Albers*, 54 Misc. 37.

The effect of section 44 is that if a term of the court fails the court has power by statute to act at the next term of the court with the same effect that it could have done at the term which failed. *People v. Swales*, 33 Hun, 208.

Contested motions requiring notice cannot be heard at a Special Term adjourned by the justice holding it to his chambers, unless by consent of all the parties. The section is a substitute for section 41, chapter 470, Laws of 1847. *Matter of Wadley*, 29 Hun, 12.

The language of section 41 is construed in *People v. Swales*, 33 Hun, 208.

A proceeding instituted by freeholders of a town in investigation of its financial affairs authorized by section 3 of the General Municipal Law is a special proceeding, and when begun in the county in which the town is situated before the only justice of the Supreme Court residing in that county may, upon his subsequent disqualification to hear the proceeding, be continued under Code, section 52, before a justice of the Supreme Court residing in the adjoining county. *Matter of Investigation of the Affairs of the Town of Hadley*, 44 Misc. 265.

Subd. 3. Statute of Limitations in Special Proceedings. §§ 414, 2517.

§ 414. Cases to which this chapter applies.

The provisions of this chapter apply, and constitute the only rules of limitation applicable to a civil action or special proceeding except in one of the following cases:

1. A case, where a different limitation is especially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defence which accrued before the first day of July, 1848. The statutes then in force govern, with respect to such a cause of action or defence.

3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases, the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word, "action," contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

§ 2517. *Id.*; within the statute of limitations.

The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in § 2520 of this act, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in § 2522 of this act.

The word "action," as used in section 405 of the Code of Civil Procedure, should, as prescribed in section 414 of said Code, be construed to include a special proceeding.

While the limitations prescribed by section 414 of the Code of Civil Procedure apply only to the sections of chapter 4 of the Code of Civil Procedure, in which chapter it is embraced, prescribing limitations of time for the commencement of actions or special proceedings, section 405 of said Code is general and applies to every limitation whether prescribed by chapter 4 or by some special provision. *People ex rel. McCabe v. Snedeker*, 106 App. Div. 90.

Statutes of Limitations prescribed by sections 380, 382 and 414 of the Code of Civil Procedure are not applicable to the remedies provided by section 225 of the Tax Law for procuring the repayment of a void tax. The Tax Law contains within itself all the limitations affecting the duty and liability of the State Comptroller to make restitution of a transfer tax illegally imposed. *Matter of Hoople*, 93 App. Div. 486.

The rules prescribed by chapter 4 of the Code of Civil Procedure, limiting the times within which actions must be brought and special proceedings instituted, apply to mandamus. Under section 414 thereof the proceedings should have been instituted by a relator within the same period of time as that within which he might have enforced his claim by an action, that is, within six years, the time fixed by section 382. *People ex rel. Sheridan v. French*, 31 Hun, 617.

A mandamus proceeding to compel drainage commissioners to levy an assessment provided by the Drainage Act is a special proceeding within the meaning of section 414, which prescribes that the Statute of Limitations contained in the Code would apply to a civil action or special proceeding. *People ex rel. Nelson v. Marsh*, 82 App. Div. 571; *aff'd*, 178 N. Y. 618.

A proceeding to compel a guardian to account is a special proceeding, and the rule of limitations of section 414 is applicable the same as if it were a civil action. *Matter of Lewis*, 36 Misc. 741, citing *Church v. Olendorff*, 19 St. Rep. 700.

The fact that more than six years have elapsed since accrual of the right to compel executors to account does not bar an infant party and heir-at-law from having such a proceeding taken in her interest because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her. *Matter of Pond*, 40 Misc. 66.

A special proceeding before a surrogate is subject to section 414 of the Code and such a proceeding to enforce an accounting must be commenced within six years after the right to acquire it shall have accrued. *Matter of Van Dyke*, 44 Hun, 394.

The limitation for the instituting of supplementary proceedings is fixed at ten years from the accruing of the right thereto by sections 388, 414 and 415 of the Code. *Conyngham v. Duffy*, 125 N. Y. 200; cited *Baumlum v. Ackerman*, 63 Hun, 40.

It is held in *Cleveland v. Johnson*, 5 Misc. 484, that under sections 414 and 2435 proceedings supplementary to execution may be commenced only within ten years from the return of the execution unsatisfied.

A lapse of ten years from the date of the return of the execution issued upon the judgment bars the judgment creditor's rights to examine a third person as to personal property of the judgment debtor alleged to be in his hands. *Peck v. Disken*, 41 Misc. 473.

Subd. 4. Miscellaneous Provisions Applicable to Special Proceedings. §§ 433, 716, 815, 825, 867, 1688, 1777, 1814, 1900, 3316, 3352. **Civil Rights Law, § 25 (formerly § 860, Code.)**

The following provisions of the Code, scattered through the various chapters and titles, are here grouped for convenience of reference in the order in which they appear therein:

§ 433. Service of process, etc., to commence a special proceeding.

The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

§ 716. Certain receivers may hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

§ 815. Bonds, etc., not affected by change of parties.

An bond of undertaking, given in an action of special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and affect, as if then given anew, in conformity to the change of parties.

§ 825. Papers in special proceedings; where to be filed.

A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the Supreme Court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.

§ 25. Civil Rights Law; witness exempt from arrest.

A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or

special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

§ 867. Production, etc., of book of account.

A person shall not be compelled to produce, upon a trial or hearing, a book of account, otherwise than by an order requiring him to produce it, or a subpoena *duces tecum*. Such a subpoena must be served at least five days before the day when he is required to attend. At any time after service of such a subpoena or order, the witness may obtain, upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpoena or the order for production, upon such terms as justice requires, touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

§ 1688. When special proceeding to recover real property not allowed.

A special proceeding to recover real property cannot be taken, except in a case specially prescribed by law.

§ 1777. Misnomer, when waived.

In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

§ 1900. Action for suing, etc., in name of another. Made also a misdemeanor.

If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court of record, or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

§ 3316. Juror's fees in special proceedings.

A trial juror, sworn in a special proceeding, before a judge of a court of record; or upon a writ of inquiry; or upon a trial, before a sheriff, of a claim to personal property, seized by virtue of a warrant of attachment or an execution; is entitled

to twenty-five cents, to be paid by the person at whose instance the jury is impanelled.

§ 3352. Effect of this act, upon proceedings taken, or rights accrued, etc., under former statutes.

Nothing contained in any provision of this act, other than in chapter fourth, renders ineffectual, or otherwise impairs, any proceeding in an action or a special proceeding, had or taken, pursuant to law, or any other lawful act done, or right, defence, or limitation, lawfully accrued or established, before the provision in question takes effect; unless the contrary is expressly declared in the provision in question. As far as it may be necessary, for the purpose of avoiding such a result, or carrying into effect such a proceeding or other act, or enforcing or protecting such a right, defence, or limitation, the statutes in force on the day before the provision takes effect are deemed to remain in force, notwithstanding the repeal thereof.

Under sections 425 and 433 an order for the examination of a third party in proceedings supplementary to execution may not lawfully be served upon the third party by the judgment creditor since it is a special proceeding under section 2433. *Matter of Dawes*, 108 App. Div. 174.

An arrest made contrary to the provisions of this section is absolutely void and is a contempt of the court, if any, from which the subpoena was issued, or by which the witness was directed to attend. *Code Civ. Pro.*, §§ 860, 863; now § 25, *Civ. Rights Law*.

The provisions with regard to preferences do not admit of classification as to actions and special proceedings. In certain cases provided by section 789 and the sections following the provisions relate only to actions; in others to actions and special proceedings, so that it is necessary to consult carefully the various sections relative to preferences in order to ascertain whether special proceedings are included therein. Section 796 and the section following, relative to service of papers provide for service of papers "in an action" and impliedly exclude special proceedings. This is also true as to section 803, with reference to discovery of books and papers which relate to "a party to an action." Section 852 relative to service of subpoena is a general provision as to "a subpoena issued out of the court," while section 854 authorizes a judge, arbitrator, referee, board, or committee to issue a subpoena, enumerating a large number of cases in which such subpoena may be issued, but excludes any matter arising in an *action* in a court of record. Section 870, relating to deposition of a party or of a person who expects to be a party, relates "to an action pending in a court of record." Sections 887 and 888, relative to depositions taken without the State for use within the State, seem to provide the remedy only in case of an action.

Rule 37 of the General Rules of Practice, providing that all questions for argument and all motions made at Special or Trial Terms shall be brought before the court on a notice of eight days, unless a shorter time is prescribed by an order to show cause under section 780 of the Code of Civil Procedure, prescribes the only method of bringing on a hearing in a special proceeding of which the court has already taken jurisdiction. *Matter of Cutting*, 49 App. Div. 388.

ARTICLE III.

SPECIAL PROCEEDINGS ENUMERATED.

The following have been held to be special proceedings:

An application for admission to practice as an attorney. *Matter of Cooper*, 22 N. Y. 67, more fully as *Matter of Graduates*, 11 Abb. 301. Proceedings to compel the support of poor relations. *Haviland v. White*, 7 How. 154. Motion to set aside confession of judgment for defect in statement. *Belknap v. Waters*, 11 N. Y. 477. Proceedings under the General Assignment Acts. *Matter of Thorn*, 10 Daly, 71; *Matter of Potter*, 8 St. Rep. 261.

Petition by creditor for leave to begin an action against a lunatic. *Williams v. Estate of Cameron*, 26 Barb. 172. Proceedings to change location of toll-gate. *McAllister v. Albion Plankroad Co.*, 11 Barb. 611. Proceedings to condemn land for water purposes. *Matter of Waverly Water-Works*, 16 Hun, 57.

Reference to ascertain the rights of parties in surplus on statutory foreclosure. *Elwell v. Robins*, 43 How. Pr. 108; *Matter of Gibbs*, 58 How. Pr. 502; *Mutual Life Ins. Co. v. Anthony*, 23 Wkly. Dig. 427. A proceeding to secure the settlement of the accounts of a deceased trustee, and the appointment of a successor which is neither commenced nor prosecuted by a summons and complaint. *Matter of Simpson*, 26 Hun, 459; *In re Livingston*, 34 N. Y. 555. See, however, *Losey v. Stanley*, 83 Hun, 420. A proceeding to compel a special guardian to account. *Spelman v. Terry*, 74 Hun, 448. A proceeding for the relief of imprisoned debtors. *In re Brady*, 69 Hun, 215. A proceeding to remove a guardian. *Matter of King*, 42 Hun, 607. The probate of a will. *Matter of Gates*, 26 Hun, 181. An application to enforce the liability imposed by statute, declaring an assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action. *Marvin v. Marvin*, 78 N. Y. 541. An application to compel a receiver to pay over moneys. *People v. Bank of Rochester*, 96 N. Y. 32. Proceedings by commissioners of assessment to extend a street in city of New York. *Matter*

of *Mayor, etc.*, 27 St. Rep. 188. An application for an order under the Election Law overruling the decision of an officer with whom the certificates of nomination of a candidate are filed as to the validity thereof. *Matter of Mitchell*, 81 Hun, 401 ; *Matter of Emmet*, 150 N. Y. 538 (541).

A proceeding brought by one holding mortgages upon the shares of two of the defendants, in an action for partition commenced after entry of interlocutory judgment for the sale of the premises upon a motion in which an order of reference was made to ascertain and report, is a special proceeding. It is not an action, nor, as the mortgagee is not a party to the partition action, is it a motion in the action. *Byrnes v. Labagh*, 12 Civ. Pro. 417.

A proceeding to vacate an assessment. *Matter of Manhattan Savings Institution*, 82 N. Y. 142 ; *Matter of Protestant Episcopal School*, 86 N. Y. 396. But see *Matter of Jetter*, 78 N. Y. 601.

Proceedings to assess damages for a local improvement. *King v. Mayor of New York*, 36 N. Y. 182. Proceedings taken to acquire land by the city of Brooklyn, under chapter 481, Laws of 1892, are special proceedings. *Matter of the Application of the City of Brooklyn for Authority to Acquire Property from the Long Island Water Supply Co.*, 148 N. Y. 107.

A proceeding against the assignor of a cause of action to charge him with costs under section 3247, which provides that where an action is brought in the name of another by a transferee, he is liable for costs as if plaintiff, and that, where costs are awarded against plaintiff, the court may direct the person so liable to pay them, is a special proceeding properly commenced by notice or order to show cause. *Friedman v. Metropolitan SS. Co.*, 109 App. Div. 600, 96 Supp. 331. A proceeding to punish for contempt is a special proceeding, original in its character, and independent of the proceeding in which it arose. *Gibbs v. Prindle*, 11 App. Div. 470, citing *Erie Railway Co. v. Ramsey*, 45 N. Y. 637 ; *People ex rel. Grant v. Warner*, 51 Hun, 53.

A proceeding to change the place of trial of a criminal action is a matter outside of that action, and not a necessary part of the criminal action, and is within the definition of the Code of a "special proceeding." *People v. McLaughlin*, 2 App. Div. 408. See 150 N. Y. 365. A proceeding for the appraisal of stock of a corporation which sells its property and franchises to another corporation under section 33 of the Stock Corporation Law is a special proceeding, and the making of the application may be said to be begun when the pro-

ceeding is begun. In a legal sense it is begun then and ends at the hearing in court. *Matter of Ennis v. Federal Brewing Co.*, 123 App. Div. 691.

The taking of property in a street widening proceeding by grade crossing commissioners in Buffalo is a special proceeding. *Matter of Grade Crossing Commissioners*, 20 App. Div. 271. A proceeding taken by the city of New York under the Consolidation Act to acquire lands under the right of eminent domain is, within the definition of the Code, a special proceeding, and should be heard, as such proceedings are ordinarily heard, although no particular method of procedure is prescribed by that act. *Matter of the Mayor*, 22 App. Div. 124.

Application by a bankrupt for discharge from a judgment under section 150, Debtor and Creditor Law. *Guasti v. Miller*, 203 N. Y. 259.

Proceedings for opening of a street under the charter of the city of New York are special proceedings wherein a final judgment is a conclusive adjudication of the rights of all parties interested. *Matter of the Opening of 163d Street*, 61 Hun, 365, 40 St. Rep. 684; appeal dismissed, 131 N. Y. 569. An application for an order appointing commissioners to appraise the damages caused by the extension of a street. *Matter of South Market St., in Johnstown*, 80 Hun, 246.

Proceedings for the removal of a justice of the peace are special proceedings, and the order therein is a final order affecting a substantial right. *Matter of King*, 130 N. Y. 602. An application to strike names from the registry of voters, under the Election Law. *Matter of the Registration of Lyman C. Ward*, 48 St. Rep. 613-619.

Proceedings taken under the General Municipal Law (Laws 1892, chapter 685, section 3), by resident freeholders of a village, who claim that its officers are unlawfully expending the moneys raised by taxation therein, and ask for an investigation. *Matter of Town of Hempstead*, 32 App. Div. 6; *People ex rel. Guibord v. Kellogg*, 22 App. Div. 177, citing *Matter of Cooper*, 22 N. Y. 67; *Matter of Reyers*, 72 N. Y. 1; *Marvin v. Marvin*, 78 N. Y. 541; *Matter of King*, 130 N. Y. 602-606; *Matter of Emmett*, 150 N. Y. 538-541.

An application to cancel a liquor tax certificate under the provisions of the Liquor Tax Law. *Matter of Lawson*, 109 App. Div. 195. A motion made by the foreign committee of a lunatic who is a beneficiary for an order directing transmission of surplus income

to such committee. *Matter of Mankowskie*, 49 Misc. 606. An order appointing commissioners of appraisal under the Condemnation Law is an order made in a special proceeding. *Matter of Broadway & 7th Av. R. Co.*, 69 Hun, 275.

An application to the special term under section 11 of article 1 of the General Railroad Law (chapter 565, Laws of 1890), by a railroad for authority to construct its road upon a street in an incorporated village, is a special proceeding. *Matter of Lima, etc., R. Co.*, 68 Hun, 252. It is said in the opinion that the definition of a special proceeding under the Code does not purport to be exhaustive ; it declares that certain prosecutions are special proceedings, but it does not exclude all other proceedings from the same category. Citing *Renns. & Saratoga R. Co. v. Davis*, 55 N. Y. 145 ; *Matter of Jetter*, 78 N. Y. 601 ; *Matter of Long*, 39 St. Rep. 892 ; *Matter of Holden*, 126 N. Y. 589.

Condemnation proceedings by a street surface railroad corporation to extend its lines are not, in the strict sense of the term, condemnation proceedings to acquire title to land, but are regarded as special proceedings. *Hornellsville, etc., R. Co. v. N. Y., L. E. & W. R. Co.*, 83 Hun, 407-412, citing *Matter of Lockport & B. R. R. Co.*, 77 N. Y. 557 ; *Buffalo, etc., R. Co. v. N. Y., L. E. & W. R. Co.*, 72 Hun, 583.

It was held that a proceeding by the Attorney-General under chapter 383 of the Laws of 1897, an act designed to prevent monopolies in articles and commodities in common use, for an order for the examination of witnesses for the purpose of determining whether an action should be commenced under the act, was a special proceeding. *Matter of the Attorney-General*, 22 App. Div. 285. The contrary was held, however, on appeal, 155 N. Y. 441, and it was said that the order of the Appellate Division affirming the order vacating the order for the examination of witnesses and granted *ex parte*, by a justice of the Supreme Court under section 5 of the act to prevent monopolies, was not an order finally determining a special proceeding. Citing *Rochester Lamp Co. v. Brigham*, 1 App. Div. 490, to the point that an order for the examination of witnesses before trial, but after the action brought, was clearly an order in an action. The court also cited to the same point, *Van Arsdale v. King*, 155 N. Y. 325. Proceedings for contempt. *Holstein v. Rice*, 15 Abb. 307 ; *Gray v. Cook*, 15 Abb. 308 ; *Woolf v. Jacobs*, 5 Hun, 428 ; *Erie Railway Co. v. Ramsey*, 45 N. Y. 637 ; *Hart v. Johnson*, 7 St. Rep. 133. But not for criminal contempt. *People v. Gilmour*, 88 N. Y. 626.

An order punishing a party to an action as for a contempt is not an order made in a proceeding in the action, within the provisions of the Code as to appeal from an order made in an action, but is an order made in a special proceeding. *Sudlow v. Knox*, 7 Abb. Pr. N. S. 411.

A proceeding to punish defendant for contempt to enforce a civil remedy instituted by an order to show cause is a proceeding in an action, not a special proceeding; under sections 2273-2283, an order to show cause is equivalent to a notice of motion, and the subsequent proceedings are in the action. *Ray v. N. Y. Bay Extension Co.*, 155 N. Y. 102, dismissing appeal from 20 App. Div. 539; *Jewellers' Mercantile Agency v. Rotchschild*, 155 N. Y. 255, following *Pitt v. Davison*, 37 N. Y. 235.

As to when a proceeding to punish for contempt is, and when not, a special proceeding, see *Batterman v. Finn*, 40 N. Y. 340; *Brinkley v. Brinkley*, 47 N. Y. 40; *N. Y. & N. H. R. R. Co. v. Ketcham*, 3 Abb. Dec. 347; *Woodhouse v. Woodhouse*, 5 Redf. 131; dissenting opinion in *Matter of Nichols*, 54 N. Y. 62, 70-74.

Mandamus is a special proceeding within the meaning of section 414 of the Code, which prescribes that the Statute of Limitations contained in that Code shall apply "to a civil action or special proceeding." *People ex rel. Nelson v. Marsh*, 82 App. Div. 571; aff'd, 178 N. Y. 618.

Supplementary proceedings of course are special proceedings. *Matter of Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 473, aff'g 132 App. Div. 265.

A proceeding by attachment against an attorney to compel the payment to the county treasurer of surplus money in an action of foreclosure in which he acted as attorney for the petitioners is a special proceeding and the costs are properly allowed, as in a special proceeding. It is not a mere motion in the foreclosure suit. *Matter of Silvernail*, 45 Hun, 575.

The Supreme Court has jurisdiction to determine controversies arising out of the professional relations of attorneys and clients, and upon what terms attorneys shall be changed in pending actions, either upon motion or in a summary special proceeding. *Matter of Barkley*, 42 App. Div. 597, 611.

A proceeding upon petition of an attorney to establish his lien. *Matter of Fitzsimmons*, 174 N. Y. 15, citing *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521; *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492; *Matter of King*, 168 N. Y. 53.

A proceeding by mandamus under section 114 of the Election Law for the recount of ballots objected to as marked for identification or rejected as void is a special proceeding. *People ex rel. Feeney v. Board of Canvassers*, 156 N. Y. 36. An application for an order to vacate a judgment entered by confession on account of a defect in the statement. *Belknap v. Waters*, 11 N. Y. 477. An application to the Supreme Court under the statute to compel specific performance by infant heirs on a contract for the sale of land made by the ancestor. *Hyatt v. Seeley*, 11 N. Y. 52.

A proceeding to enforce a civil remedy by attachment for contempt. *Holstein v. Rice*, 15 Abb. Pr. 307. Proceedings for removal from office of police justice. *Matter of King*, 130 N. Y. 602. An order that the receiver pay notes out of trust funds in his hands. *People v. City Bank of Rochester*, 96 N. Y. 32. Proceedings for leave to mortgage trust funds. *Matter of Clark*, 27 Abb. N. C. 144. Proceedings under section 915 of the Code to punish a witness for contempt in failing to give testimony for use in another State. *Matter of Strong v. Randall*, 177 N. Y. 400.

A proceeding instituted by a trustee of a trust fund for leave to resign, and for leave to procure the appointment of a new trustee, is a special proceeding. *Matter of Holden*, 126 N. Y. 589.

In *Matter of Emmett*, 150 N. Y. 538, it was held that an order made under the Election Law (Laws of 1896, chapter 909, section 56), reviewing the determination of the filing officer upon a contested certificate of nomination, is a special proceeding.

An application for leave to issue execution on a judgment, after the expiration of five years, upon which the defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment by virtue of an assignment executed by plaintiff's general agent is a special proceeding. *Ithaca Agricultural Works v. Eggleston*, 107 N. Y. 272, dist'g *Kincaid v. Richardson*, 25 Hun, 237; *Andrews v. Long*, 79 N. Y. 573.

An application to compel a purchaser to take title and that of a purchaser to be relieved from his bid is regarded as a special proceeding. *Parish v. Parish*, 175 N. Y. 181, citing *Holme v. Stewart*, 155 N. Y. 695; *Kingsland v. Fuller*, 157 N. Y. 507; *Merges v. Ringler*, 158 N. Y. 701.

The following have been held not to be special proceedings:

An order by a justice of the Supreme Court refusing to revoke an approval theretofore given by him to an order of the State Com-

mission in Lunacy is not an order in a special proceeding. It is not the prosecution for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *Matter of the Application for an Order Vacating the Approval of the Order Directed by the State Commission in Lunacy to the Board of Commissioners of Charities and Corrections in Kings County*, 76 Hun, 74.

In *People v. St. Nicholas Bank of N. Y.*, 150 N. Y. 563, it was held that an order of the Special Term overruling exceptions to the report of a referee appointed under the statute (2 R. S. 45, as amended by chapter 373, Laws of 1862), to determine a controversy between a claimant and the receiver of a bank, was not a special proceeding within the provisions of the Constitution. Citing *People v. Am. L. & T. Co.*, 150 N. Y. 117, holding that an order of the Appellate Division, affirming an order directing the permanent receiver of a corporation appointed by final judgment in the action, to pay the claim of a creditor of the corporation, was not an order finally determining the action or special proceeding.

An application for the commitment of an insane person to a state hospital is not a special proceeding. The application is *sui generis* and not governed by the general provisions of the Code relating to special proceedings. *Matter of Murtaugh*, 117 App. Div. 302.

A motion to set aside a presentment to the grand jury is not the commencement of a special proceeding of a civil nature, because it is not the prosecution of a party and is not a proceeding or special proceeding of a criminal nature and authorized by the Code of Criminal Procedure. *Matter of Jones*, 181 N. Y. 389.

Nor is the application by the Attorney-General for an order for the examination of the witnesses under chapter 383 of the Laws of 1897, known as the Anti-Monopoly Law. *Matter of Attorney-General*, 155 N. Y. 441.

Proceedings to assess damages suffered by reason of an injunction are not special proceedings. *Keator v. Dalton*, 171 N. Y. 650, dismissing appeal, 67 App. Div. 619, 73 Supp. 1138.

In *Wetmore v. Wetmore*, 162 N. Y. 503, the question was as to whether an application to reduce an award for alimony subsequent to the judgment was a special proceeding or a final judgment in the action. It was held to be appealable in either case.

ARTICLE IV.

COSTS IN SPECIAL PROCEEDINGS. §§ 3240, 3258, 3259, 3279.

- § 3240. *Costs; in a special proceeding, 28.*
 § 3258. *When defendant entitled to increased costs, 28.*
 § 3259. *Increased disbursements not allowed, 28.*
 § 3279. *This title applies to special proceedings, 28.*

§ 3240. Costs; in a special proceeding.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

§ 3258. When defendant entitled to decreased costs.

In either of the following cases, a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs, prescribed in § 3251 of this act, and in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the State, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.
2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment.
3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

§ 3259. Increased disbursements not allowed.

The increase, specified in the last section, does not extend to the disbursements; and an officer, witness or juror, is not entitled to any other fees in the action, except the single fee allowed by law for his services.

§ 3279. This title applies to special proceedings.

The foregoing sections of this title apply to a special proceeding instituted in a court of record, in like manner as to an action; for which purpose, the prosecuting party, other than the people, or, where the special proceeding is instituted in the name of the people upon the relation of a private corporation or individual, the relator is deemed a plaintiff, and the adverse party a defendant.

In the following cases costs are specifically provided for aside from the provisions of section 3240 :

On application for peremptory writ of mandamus, Code, section 2086; on an application for a writ of prohibition, section 2100; on application for writ of certiorari, section 2143; amount of costs and fees in summary proceedings to dispossess, section 2250; costs in

proceedings to discover the death of a tenant for life, section 2316; costs allowed in proceedings to foreclose mortgage by advertisement, section 2401; costs to judgment creditor or judgment debtor in supplementary proceedings, sections 2455, 2456. For authorities on the subject in those cases see the respective titles.

Section 3240 refers only to such cases as are not otherwise provided for in the Code. *Matter of Wilson*, 103 N. Y. 374.

The allowance of costs in special proceedings rests in the discretion of the court, except when the right to them is expressly given by statute. *Matter of Potter*, 8 St. Rep. 261. Costs in special proceedings are in the discretion of the tribunal hearing and deciding the case. If allowed, they must be at the rate allowed for similar proceedings in civil actions. *People v. Fire Commissioners*, 5 Abb. N. C. 144; *Matter of Protestant Episcopal School*, 86 N. Y. 396; 24 Hun, 367.

The fact that a matter is a special proceeding does not prevent the allowance of necessary expenditures as disbursements. *Matter of Department of Public Parks*, 27 Hun, 305.

It was held in *Matter of Durham*, 49 Super. Ct. 487, that the Code leaves the question of awarding or denying costs in special proceedings to the discretion of the court. The discretion contemplated by the law is not a mere unreflecting caprice, exercised in violation of right, but a judicial discretion to be used according to the rules of a court of equity.

While under the provisions of section 3240, costs are in the discretion of the court, such discretion should not be exercised against a party who has prevailed upon the issue. *Ward v. Ward*, 67 App. Div. 121, 73 Supp. 450.

Costs of the special proceeding, not especially regulated by statute, may be awarded at the rate allowed in an action. *Matter of Department of Public Works*, 78 App. Div. 631, 79 Supp. 662. A court has no power to grant allowances in special proceedings; it can only allow costs at the rates allowed for similar services in an action brought in the same court, and in like manner. *Matter of Simpson*, 26 Hun, 459. Section 3240 does not permit the granting of an extra allowance in special proceedings. *Matter of Manskowski*, 49 Misc. 606.

Power to award costs in special proceedings is fixed and limited by section 3240, and under it a court has no power to grant extra allowances; it can only award costs in its discretion at the rate allowed for similar services in an action brought in the same court.

Matter of Holden, 126 N. Y. 589; cited, *Matter of City of Brooklyn*, 148 N. Y. 107.

Upon the coming in of a referee's report dismissing the petition of a third person praying that a judgment of divorce be vacated, and awarding to plaintiff \$350 as compensation for disbursements and counsel fees, to be paid by the petitioner, it was held that, in so far as the order awarded the said compensation to the plaintiff, such compensation being neither the costs of a motion, nor costs of a special proceeding, but being a gross sum allowed as compensation for disbursements and counsel fees in the proceeding, it should be reversed. *Simmons v. Simmons*, 32 Hun, 551.

Where proceedings are instituted by a railroad company under the law of this State, and after report by commissioners making their award, and before confirmation, the railroad moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor, as, under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted are within the discretion of the court. While the provisions of the statute relating to extra allowances do not apply to special proceedings, and such an allowance cannot be made under an order giving costs, but in such cases the limitations "for similar services, as in actions," controls, yet that restriction has no application on a motion for favor. The court in granting such a motion is not restricted to costs and disbursements as a condition. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. Pr. (N. Y.) 190. A proceeding under the General Railroad Act is a special proceeding, but is more analogous in its purpose and scope to an action than to a motion, and the court is justified in allowing full costs as in an action. *Matter of Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145. The general rule is, that, in proceedings to acquire land under the General Railroad Act, costs are to be awarded under the provisions of this section, it being a special proceeding. Where commissioners were appointed without opposition, and a hearing had at which witnesses subpoenaed by the landowner were sworn and examined as to the value of the land, it was held that there was no issue made, and as no question of fact had been raised or tried, no trial fee should be allowed. *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592.

A proceeding to acquire an easement in lands for the construction of a sewer in a city is a special proceeding, and costs may be al-

lowed in the discretion of the court. *Matter of Wells Avenue Sewer*, 46 Hun, 534.

Where there has been a trial of an issue raised on a proceeding to acquire land for public purposes and an appeal is taken from the order granting the petition, the case is within section 3240 and costs may be properly allowed as in an action. *Matter of Application of Long*, 39 St. Rep. 892.

An application at Special Term under section 11 of article 1 of the General Railroad Law by a railroad company for authority to construct a road upon a street in an incorporated village is a special proceeding, and costs as in an action are allowable in the discretion of the court. *Matter of Application of Lima & Honeoye Falls R. R. Co.*, 68 Hun, 252, 52 St. Rep. 186; followed and approved in *Hornellsville R. R. Co. v. N. Y., L. E., etc., R. R. Co.*, 83 Hun, 407, citing *Matter of L. & B. R. R. Co.*, 77 N. Y. 557; *Buffalo, etc., R. R. Co. v. N. Y., L. E., etc., R. R. Co.*, 72 Hun, 583.

A proceeding under the General Railroad Act by one railroad corporation to secure a crossing over the track of another railroad is a special proceeding and the costs therein are in the discretion of the court. *Matter of Cortland, etc., Horse Railroad Co.*, 98 N. Y. 336.

Under section 159 of the Village Law, relative to recovery of damages resulting from changing the grade of village streets, the petitioning property-owner is not entitled, as a matter of right, to costs except to proceedings after the appointment of commissioners. The costs incurred previous to that time are in the discretion of the court under section 3240. The provisions of the Condemnation Law do not affect in any manner the costs incurred by petitioner prior to the appointment of commissioners. *Matter of Bley v. Village of Hamburg*, 84 App. Div. 23.

On certiorari to review the conviction of city officers by the mayor of a city, in their removal from office, costs may be awarded at the rates allowed for similar services in an action. *O'Neill v. Mansfield*, 47 Misc. 516.

There is no statute which provides for costs or allowances in a condemnation proceeding instituted by the city to acquire lands for a public purpose, and therefore none can be allowed. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 Supp. 321.

Property owners who are parties to the condemnation proceedings instituted by the rapid transit commission of the city of New

York, under the authority of the Rapid Transit Act, are not entitled to be allowed costs in an ordinary special proceeding or any sums for counsel fees or compensation to expert witnesses. Counsel fees referred to under section 62 of the act are such as may be incurred by the city or the corporation counsel. *Matter of Low*, 103 App. Div. 530.

In the absence of a statute providing for costs or allowances for expenses in condemnation proceedings none can be allowed. *Matter of Rapid Transit Commissioners*, 197 N. Y. 81, modif'g 128 App. Div. 103.

A proceeding to tax the bill of an expert against the city of New York for services in a proceeding to acquire lands is not a special proceeding within the meaning of the statute relating to costs, and only \$10 can be allowed him. *Matter of Mayor of New York*, 69 Supp. 178.

In 148 N. Y. 107, *Matter of City of Brooklyn*, it was held that in the absence of a statute providing for costs and allowances for expenses none can be recovered. That the authority given by section 3372 of the Code granting an extra allowance to defendant in condemnation proceedings does not apply or extend to a proceeding taken under a subsequent special statute. That the right to costs in condemnation proceedings taken under such statute containing no provisions for costs or allowances is governed by section 3240 of the Code.

This matter is also reported in 10 Misc. 650.

Proceedings taken by grade crossing commissioners of Buffalo for the appointment of commissioners is a special proceeding, and costs rest in the discretion of the court. *Matter of Grade Crossing Commissioners*, 17 App. Div. 54. See also *Matter of Grade Crossing Commissioners*, 20 App. Div. 271.

The statute providing for the acquisition of lands for the Catskill aqueduct (Laws of 1905, chapter 724, as amended by Laws of 1906, chapter 314) authorizes an allowance to parties of sums "as expenses and disbursements, including reasonable compensation for witnesses," which is substantially a provision for costs; and section 3240 of the Code of Civil Procedure is therefore not applicable to a proceeding for such purposes. *Matter of Catskill Aqueduct, Section No. 2*, 62 Misc. 324.

On the condemnation of lands under chapter 724 of the Laws of 1905, providing for an additional water supply for the city of

New York, the allowance of costs is governed by section 13 of that act. The parties are not entitled to costs as in an action under section 3240 of the Code of Civil Procedure. *Matter of Simmons*, 130 App. Div. 350.

A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under the Code, sections 2250, 3076, subd. 2, to \$10 costs and no more, and is not entitled to an extra allowance under Code, section 3253. Code, section 3240, does not apply to a summary proceeding. *Lauria v. Capobianco*, 39 Misc. 441.

Section 3240 does not regulate the costs in summary proceedings to recover the possession of land before a justice of the peace on reversal by the County Court. Sections 2260 and 3066 granting costs, as of course, are applicable. *Harrison v. Swart*, 34 Hun, 259.

In summary proceedings to recover the possession of real property, a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs. The proceeding is not such a special proceeding instituted in a court of record as is contemplated by section 3279. It is a proceeding before a magistrate. *Hasler v. Johnston*, 59 How. 432.

Although proceedings supplementary to execution are distinct special proceedings, under section 2433, yet the method of reviewing an order made therein and the practice relating thereto are the same as if an order had been made in an ordinary action. Upon reversal on appeal from the order adjudging defendant guilty of contempt made on a motion in supplementary proceedings, the costs are limited to \$10 and disbursements. *Jones v. Sherman*, 18 Abb. N. C. 461, 8 St. Rep. 344, 11 Civ. Pro. 416, citing *Phipps v. Carman*, 26 Hun, 518; *People v. Cooper*, 10 Wkly. Dig. 77.

In proceedings to punish for contempt, where the party acted in good faith and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. *People v. Cooper*, 20 Hun, 486. No costs are allowed in a proceeding to punish for a criminal contempt. *People v. Gilmore*, 88 N. Y. 626.

The provisions of section 259 (now section 299) of the Tax Law, exempting the county treasurer from the payment of costs in supplementary proceedings instituted by him for the collection of a tax, only applies to the original proceedings, and does not apply to an unsuccessful appeal taken by the county treasurer from

an order dismissing the supplementary proceeding. *Matter of Pryor*, 67 App. Div. 316.

The costs of an investigation into the financial affairs of a village under Laws of 1892, chapter 685, section 3, if any are awarded, must be restricted by force of section 3240 to those allowed for similar services in an action. When the first opportunity to object to the costs of such an investigation, or to raise any question as to the amount, is afforded by the service or publication of a final order awarding costs, a party who then objects by appeal cannot be held guilty of *laches*, or be considered to have waived the right to question the allowance of costs. *Matter of Taxpayers of Plattsburg*, 157 N. Y. 78, rev'g 27 App. Div. 353.

Costs in the matter of the investigation of financial affairs of a town under chapter 885 of the Laws of 1892 are to be awarded in the discretion of the court at the rates allowed for similar services in an action brought in the same court. *Matter of the Town of Hempstead*, 36 App. Div. 321; aff'd, 160 N. Y. 685.

It is a settled rule of practice not to allow costs in a special proceeding by an elevated railroad company to acquire lands. *Matter of Union Elevated R. R. Co.*, 55 Hun, 163.

In proceedings instituted by a taxpayer under the provisions of section 4 of chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871, no costs can be awarded by a county judge. *Matter of Petition of Hill v. Sheldon*, 55 Hun, 44.

Proceedings by a receiver of taxes to compel the payment of a personal tax begun by petition and order to show cause is a special proceeding, and where costs are allowed by the court to the defendant he is entitled to tax costs as allowed for similar services in an action. *McLane v. Jephson*, 26 Abb. N. C. 40.

Proceedings for leave to mortgage trust lands are special proceedings within the statute as to costs, and where objection has been made and it has been referred to a referee to take proof and report thereon and a hearing has been had before him, and upon his report a final order is made, it is a trial, and costs before and after notice of trial and a trial fee are allowable. Such an order is a final order, and upon appeal from it costs are the same as upon an appeal from a judgment or determination. But printing the evidence taken before the referee is not making a case within the statute and an allowance of \$10 therefor is unauthorized. *Matter of Clarke*, 27 Abb. N. C. 144, dist'g *N. Y., L. E. & W. R. R. Co.*,

26 Hun, 593, following *Matter of Jetter*, 78 N. Y. 601; *People v. City Bank of Rochester*, 96 N. Y. 32.

Costs are properly allowed on an application to compel an attorney to pay over moneys in his hands. *Matter of Silvernail*, 45 Hun, 575.

A proceeding under the Highway Law to lay out a highway is a special proceeding in which the petitioner, if successful, is entitled, in the discretion of the court, to recover costs and disbursements at the rate allowed in an action. Section 152 of the Highway Law only relates to costs of motions made in such proceeding as distinguished from the costs of the proceeding itself, and does not prevent the court from awarding costs under section 3240. *Matter of Application of Peterson*, 94 App. Div. 143.

Provisions of section 3258, providing that on final order in favor of defendant in a special proceeding instituted by State writ, the defendant, if a public officer, can recover costs as specified in section 3251 and one-half thereof in addition thereto, does not apply to certiorari proceedings, the costs in which are regulated by section 2143 of the Code. *People ex rel. Hall v. Town Auditors*, 42 App. Div. 250.

It seems that in an order revoking a liquor tax certificate made in a proper case charging the costs of the property upon the county treasurer who granted the certificate, who was a party to the proceeding, the court has not power in such proceeding to direct costs awarded against the county treasurer to be paid out of the excise moneys received by him. *Matter of Seymour*, 47 App. Div. 320, 62 Supp. 25.

Where an appeal is taken from an order, judgment, or determination made in a proceeding instituted under chapter 269 of the Laws of 1880 for the review and correction of an erroneous, illegal, or unequal assessment, costs are to be given or withheld in the discretion of the court under section 3239 of the Code. It seems that costs cannot be taxed as of course under section 3240. *People ex rel. Warren v. Carter*, 46 Hun, 444, followed, *People ex rel. Smith v. Commissioners Taxes and Assessments of the City of New York*, 101 N. Y. 651. The question of costs does not seem to have been passed upon by the Court of Appeals in *Remsen v. Wheeler*, 105 N. Y. 576.

In *People ex rel. Smith v. Asten*, 101 N. Y. 651; s. c., 1 St. Rep. 37, where, on certiorari to review the action of assessors under chapter 269, Laws of 1880, which relieves them from costs below,

except in case of bad faith, the Court of Appeals held that on an appeal from such a determination costs may be given or withheld in the discretion of the court.

Proceedings taken by creditors and others under the Assignment Acts are special proceedings (citing sections 3333, 3334, 3343, subd. 20), and costs may be allowed in them as in a special proceeding. *Matter of Thorn*, 10 Daly 71.

On proceeding for discharge of a debtor from imprisonment on execution, there can be no costs to respondent before notice, as the notice of the application is not only the institution of the proceedings, but the only notice of trial. He is entitled to costs after notice, and as the parties, when in court are there for a trial, a trial fee should be allowed whether the petition is dismissed for default in appearing to prosecute or upon the merits. *Matter of Davis*, 2 Law Bull. 96.

Proceedings to compel an accounting by a special guardian appointed to sell an infant's real property constitute a special proceeding, and where a question of fact is referred, the referee's fees might, under the former statute, be allowed as costs. *Spelman v. Terry*, 74 N. Y. 448.

Costs may be allowed on habeas corpus under this section, although they will not be granted if reasonable cause for the writ exists, but when on habeas corpus for an infant a reference is ordered, witnesses are examined, and a decision rendered upon a hearing, costs will be allowed in the discretion of the court. *Matter of Barnett*, 11 Hun, 468. Where relator was arrested upon an execution, and the arrest was questioned on habeas corpus, it was held that only costs for proceedings after petition, and for trial and the disbursements could be taxed. *Muller v. Bowe*, 4 Law Bull. 10. Under the former Code costs were allowed on summary proceedings to compel a party to support a relative when brought by certiorari from the Court of Sessions to the Supreme Court for review. *Haviland v. White*, 7 How. 154.

In proceedings instituted under chapter 338, Laws of 1858, where the Special Term vacated the assessment with costs to the applicant, from which order no appeal was taken, and costs were stricken out by the General Term, on appeal from an order of the Special Term denying an order to strike out, it was held that the applicant was entitled to costs at the rate allowed for similar services in actions, and the order of the General Term reversed. *Matter of Jetter*, 78 N. Y. 601. Costs are allowable on an appli-

cation to enforce the liability imposed by the statute, declaring the assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action brought by him in the name of another, as in a special proceeding. *Marvin v. Marvin*, 78 N. Y. 541.

A proceeding for the obtaining of surplus moneys arising from statutory foreclosure of mortgage is a special proceeding, and the costs allowed should be necessary disbursements and motion costs. *Matter of Gibbs*, 58 How. Pr. 502. In *Elwell v. Robins*, 43 How. Pr. 108, it was held that two motion fees might be allowed in such proceedings, one on appointment of a referee, the other on confirmation of the report. That only disbursements and motion costs are allowable is held in *Wellington v. Ulster Ice Co.*, 5 Wkly. Dig. 104; *Helrauk v. Colwell*, 2 Law Bull. 39, and *McDermott v. Hennessy*, 9 Hun, 59.

An affirmance by the General Term with costs of an order sustaining the action of excise commissioners in refusing to grant a license and dismissing writ of certiorari constitutes a direction by the court that the respondent recover costs of the appeal as in an action. The increased costs given to public officers by section 3258 are not limited to costs incurred in the court of original jurisdiction, but extend to costs of appeal. Section 3248 which requires the certificate of the judge or referee to entitle a party to increased costs under section 3258 applies only to actions and has no application to special proceedings where costs are discretionary and first awarded by the General Term. *Wood v. Excise Commissioners*, 9 Misc. 507, 30 Supp. 344.

Where on appeal to the Court of Appeals from an order of the General Term of the Supreme Court modifying an order of Special Term made upon a hearing on certiorari to review an assessment, the order at both the General and Special Terms is reversed by the Court of Appeals and the assessment vacated, with costs to the relator, in all the courts, the relator is entitled not merely to the costs at General Term but also costs on appeal, and costs may be allowed at the same rates as for similar services in an action brought in the same court. *People v. Pratt*, 22 Civ. Pro. 294, following *In re Holden*, 126 N. Y. 589.

Section 255 (now section 295) of the Tax Law, relating to appeals in supplementary proceedings instituted for the collection of a tax, is applicable to an appeal from an order dismissing such proceedings, and costs upon the appeal should be awarded against

a county treasurer as upon the appeal from an order and not as upon an appeal in a special proceeding. *Matter of Pryor*, 67 App. Div. 316.

In a special proceeding to revoke a license to sell liquor, costs may be awarded as for similar services in an action. For additional opposing parties served with the initial order to show cause, costs may be awarded as for additional defendants. Where there is a trial of an issue of fact, costs before and after notice of trial may be awarded as in an action. *Matter of Young*, 66 Misc. 216, 122 Supp. 1116.

There is no power to make an extra allowance in a special proceeding, except that in certain districts of the State such an allowance may be made in special proceedings by way of certiorari to review assessments. *Matter of Tarrytown, White Plains & M. R. Co.*, 133 App. Div. 297 (299).

A bill of costs in condemnation proceedings should not include interest on the award. *Matter of Pine's Stream, etc., in Town of Hempstead*, 114 Supp. 681. An order of the Court of Appeals affirming an order in condemnation proceedings with costs to the respondents, where there were several, *held*, to justify the allowance of a bill of costs to each respondent. *Matter of Pine's Stream, etc., in Town of Hempstead*, 114 Supp. 681.

ARTICLE V.

APPEALS. §§ 190, 191, 1356, 1357, 1358, 1359, 1360, 1361.

Subd. 1. Appeals from inferior courts, 38.

§ 1357. *Id.*; *when made by another court or judge*, 38.

Subd. 2. Appeals to Appellate Division, 40.

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Subdivision 1. Appeals from Inferior Courts.

§ 1357. *Appeal from order; when made from another court or judge.*

An appeal may also be taken to the appellate division of the Supreme Court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued

before, the judge who made the final order. But this section does not apply to a case where an appeal from the order, to a court, other than the appellate division of the Supreme Court, is expressly given by statute.

An appeal in summary proceedings noticed as from a judgment, but referring to and adopting the language of the final order, may be treated as an appeal therefrom. *Wulff v. Cilento*, 28 Misc. 551, 59 Supp. 525.

Defendant on appeal from an order of dispossession taken on his default may raise the objection that the conventional relation of landlord and tenant did not appear from the petition, though he appeared in court on one of the adjourned days. *Dreyfus v. Carroll*, 28 Misc. 222, 58 Supp. 1116.

An appeal will not lie in the County Court from a certificate showing the result of an election relative to reincorporation of the village. *Matter of Village of Sag Harbor*, 32 Misc. 624.

An appeal by a tenant in summary proceedings, where he interposed no defense and relied on technical objections to the admission of proper testimony, was held unjustified. *Hedden v. Nederburg*, 28 Misc. 233, 58 Supp. 1065. An appeal in summary proceedings must be based upon a final order which must appear in the record. *Dickinson v. Brown*, 50 Misc. 640, 98 Supp. 694. On appeal from a final order in summary proceedings, if the record does not show authority in the person who served the process, it will be presumed that the justice gave the requisite authority. *Mooney v. McGuirk*, 31 Misc. 744, 64 Supp. 41.

Where a justice of the peace punished for contempt and a writ of prohibition is obtained, restraining the justice from taking further action in the contempt proceeding, the justice may appeal from the order granting the writ, especially where it charges him with costs. *People ex rel. Deal v. Williams*, 51 App. Div. 102, 64 Supp. 457.

An order made by a county judge upon an application for the refunding of a tax illegally or improperly assessed, or levied, is an order made in a special proceeding, and as such reviewable upon appeal to the General Term under this section. *Matter of Harris v. Supervisors of Niagara*, 33 Hun, 279.

An order of a county judge directing a further assessment to be made in proceedings instituted for the drainage of swamps, as provided by chapter 608 of Laws of 1881, is final and conclusive, and no appeal lies therefrom to the General Term, either on questions of law or fact. *Matter of Swan*, 33 Hun, 200.

Since the Code of Criminal Procedure, bastardy proceedings must be reviewed by certiorari as thereby provided. *People v. Carney*, 29 Hun, 47. An appeal will not lie to the Appellate Division from an order of filiation made by the Court of Sessions of the city of New York. *Simis v. Alwang*, 48 Supp. Div. 529, 62 Supp. 1067.

An order in a special proceeding instituted before a justice of the peace is not appealable from the County Court to the Appellate Division. Where an appeal is not authorized by statute the consent of the parties cannot confer authority upon the Appellate Division to hear the appeal. *Matter of Rafferty*, 14 App. Div. 55.

In a summary proceeding the right to appeal to the Appellate Division from an order of the County Court made upon an appeal from and reversing with costs a final order in a proceeding instituted before a justice of the peace of the City Court is given by Code, section 2260. *Soop v. Burhans*, 183 N. Y. 227, rev'g 106 App. Div. 341, 94 Supp. 463. A different rule was laid down in *Barrus v. Parsons*, 109 App. Div. 634, 96 Supp. 359.

Subd. 2. Appeals to Appellate Division. § 1356.

§ 1356. Appeal from order made in the same court.

An appeal may be taken, to the appellate division of the Supreme Court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the Supreme Court; or made by a justice thereof, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to or continued before him.

The writ of certiorari is a special proceeding and an order from which an appeal is taken therein affects a substantial right. It is therefore appealable under section 1356. *People ex rel. Thomas v. Sackett*, 15 App. Div. 290.

An order made by a special county judge upon return of a writ of habeas corpus discharging the relator from imprisonment under execution issued upon a justice's judgment can only be reviewed by appeal and not by certiorari. Section 1351 includes all such orders. *People ex rel. Cattle v. Tucker*, 16 Civ. Pro. 126, 7 Supp. 192.

And an order adjudging a person in contempt is appealable under section 1356 of the Code. Section 2423 is not applicable to such cases. *Gibbs v. Prindle*, 9 App. Div. 29.

An appeal lies from an order which is absolute in adjudging a person in contempt and prescribing punishment. *Boon v. McGucken*, 67 Hun, 251, 22 Supp. 424, 23 Civ. Pro. 115. An order

made at Special Term denying an order to show cause why a party should not be punished for contempt of mandamus is final and appealable. *People v. Rice*, 144 N. Y. 249, 74 Hun, 179. An order adjudging a debtor in contempt is appealable to the Appellate Division although not a final order. *Rupert v. Lee*, 101 App. Div. 492, 92 Supp. 75.

An appeal from an order made in a special proceeding, like an appeal from an order made in an action, lies only when it affects a substantial right. Hence an appeal will not lie from an order granting an alternative mandamus, since it determines nothing in favor of the relator. *People ex rel. Ackerman v. Lumb*, 6 App. Div. 26; *Matter of Kreischer*, 30 App. Div. 313.

The statute authorizing the State Commission in Lunacy to make certain orders, and providing that "if such an order is issued it must be approved by a justice of the Supreme Court," does not make the order of the commission the order of the court, and therefore a refusal of the judge to revoke his approval is not appealable. *Matter of Board of Charities*, 76 Hun, 74, 27 Supp. 856. An order appointing a receiver in proceedings supplementary to execution is not appealable. *Moschell v. Boor*, 66 Hun, 557, 21 Supp. 683.

An appeal will not lie from an order appointing a receiver in supplementary proceedings, such order being made by a judge and not of the court, but if a review is desired, a motion to vacate the order should be made and if then denied, an appeal will lie. *Happel v. Lippe*, 48 Misc. 605, 95 Supp. 523.

Under Code, section 1357, providing for an appeal in a special proceeding, when made by a court of record and affecting a substantial right, held that an appeal could be taken in a proceeding instituted under the statute in relation to the drainage of agricultural lands. *Matter of Tuthill*, 36 App. Div. 492, 55 Supp. 657; aff'd, 163 N. Y. 133.

A proceeding to disbar an attorney-at-law is a special proceeding, civil in character, the sole inquiry being as to whether he is a person qualified and fit to hold the office. *Matter of Spencer*, 137 App. Div. 330.

An appeal from an order confirming the report of arbitrators and from the judgment entered thereon must be heard upon the same papers as were before the court at the time when the order was made and the judgment directed from which the appeal was taken. A case forms no part of the papers, and none can regularly be pro-

posed or served in any proceeding taken to make or review an application concerning an award. The proceeding prescribed by the Code for vacating or modifying or correcting an award is a motion, and the papers on which it is founded must accompany the notice of motion, and from the order made thereon an appeal may be taken and heard on the same papers upon which appeals from orders are heard in other cases. *Matter of Poole v. Johnson*, 32 Hun, 216. Such an order can only be reviewed on appeal. *Matter of Livingston*, 32 How. 20, 34 N. Y. 555.

Where a party petitioning for investigation of the mental condition of another, who is alleged to be insane, is in no sense aggrieved by the denial of his petition, neither his liberty, nor any property right being affected, he cannot appeal from the order denying the petition. *Matter of Brooks*, 119 App. Div. 780, 104 Supp. 670.

A proceeding under section 33c of the Liquor Tax Law is in the nature of a special proceeding, and a person aggrieved by an interlocutory order may appeal therefrom. *Matter of Huff*, 136 App. Div. 297. An order reversing decision of county treasurer and refusing to grant liquor tax certificate, *People ex rel. Thomas v. Sackett*, 15 App. Div. 290, 44 Supp. 593, is appealable.

Order denying writ of certiorari to review action of Superintendent of Public Instruction. *Matter of Light*, 30 App. Div. 50, 51 Supp. 743.

An appeal lies to the Appellate Division from an order made under the Election Law, section 56, reviewing the determination of the filing officers upon a contested certificate of nomination and the provision that an order reviewing the determination must be made before the last day fixed for filing certificates applies only to the original order of review and does not limit the Appellate Division. *Matter of Emmett*, 150 N. Y. 538, rev'g 9 App. Div. 237. See also *Matter of Hennessey*, 164 N. Y. 393.

As the Election Law, although providing for a review of the decision of the filing officer, does not designate the method of procedure on such review, it may be had upon a motion made upon petition filed. A public officer, like the county clerk, has a right to institute proceedings for the review of an order commanding him to do an official act which he believes to be in violation of the statutes of the State, and the fact that he has no pecuniary interest in the matter does not affect the right. *Matter of Application of Cuddeback*, 3 App. Div. 103; followed in *Matter of Application of Williams*, 3 App. Div. 618.

An application for an order under section 65 of the Election Law overruling the decision of the officer with whom the certificates of nomination of candidates is filed as to the validity thereof is a special proceeding, as defined by the Code. An appeal may be taken from an order affirming or overruling the determination of such an officer when the appeal can be heard and determined in due season. *Matter of Mitchell*, 81 Hun, 401.

An appeal to the Appellate Division in an election matter will not be dismissed where it involves a question of public interest simply because the time has passed when the rights of the parties to the appeal can be affected by its decision. *People ex rel. Spire v. General Committee*, 25 App. Div. 339, following *Matter of Cuddeback*, 3 App. Div. 103.

An appeal lies from an order of the County Court determining the validity of the Election Law. *In re Village of Harrisville v. Lawrence*, 66 Hun, 302, 21 Supp. 62. An appeal lies from an order directing the county clerk to print certain names on the official ballot when made by a justice of the Supreme Court under section 65 of the Election Law, which provides that an officer with whom certificates of nomination are filed shall pass on objections thereto and his decision shall be final, unless an order shall have been made in the matter by the court or a justice of the Supreme Court. *In re Mitchell*, 81 Hun, 401, 63 St. Rep. 121, 30 Supp. 962.

On a motion by a candidate, for mandamus to the board of canvassers to adopt a certain statement of canvass of votes, the opposing candidate moved for permission to appear and be heard, which was granted, but subsequently a further order stating that he appeared and was made a party was refused; *held*, that he could not appeal from the order, granting the writ. *People v. Bd. of Canvassers*, 50 Hun, 601, 2 Supp. 561.

An order appointing commissioners to decide upon the necessity for a highway and assess the damages is appealable under sections 1356 and 1358. *Matter of Barrett*, 7 App. Div. 483.

An order appointing commissioners in condemnation proceedings is appealable. *In re City of Utica*, 73 Hun, 256, 26 Supp. 564. *In re Broadway & Seventh Ave. R. R. Co.*, 69 Hun, 275, 23 Supp. 609, an order appointing commissioners to determine points of crossing by the intersecting of railroad tracks of one railroad over another under the Railroad Act is appealable as from an order affecting a substantial right made in a special proceeding. Such right of appeal is not prohibited by the General Railroad Act.

A proceeding in condemnation is a special proceeding and not an action, and hence no appeal can be taken in such proceedings under the general statute authorizing appeals in actions. *Erie Railroad Co. v. Steward*, 59 App. Div. 187, 69 Supp. 57.

An appeal lies from an order confirming the report of commissioners in proceedings relative to the opening of streets in the city of New York under special laws. *Matter of Kingsbridge Road*, 4 Hun, 245; aff'd in 62 N. Y. 645; *Matter of Commissioners of Central Park*, 4 Lans. 647; *King v. Mayor*, 36 N. Y. 182; *Pryor's Appeal*, 5 Abb. 572.

An appeal lies from an order of a Supreme Court justice denying a motion of the corporation counsel of New York city to retax the compensation allowed a clerk of commissioners of appraisal. *Matter of Collis*, 78 App. Div. 495, 79 Supp. 801.

An order in condemnation proceedings confirming the proceeding of new commissioners for assessment of damages is appealable. *Matter of Manhattan Railway Co. v. Stuyvesant*, 126 App. Div. 848, 111 Supp. 222.

In *Matter of Town of Guilford*, 85 App. Div. 207, it was held upon the authority of *Manhattan Ry. Co. v. O'Sullivan*, 6 App. Div. 572, which was affirmed on opinion below, 150 N. Y. 569, that an order made at Special Term setting aside the report of commissioners of appraisal appointed in the condemnation proceedings and ordering a rehearing before the same commissioners, unless the defendants would stipulate to reduce the award, was appealable to the Appellate Division notwithstanding the provisions of sections 3371 to 3375.

Under section 3375 an appeal cannot be taken from an interlocutory judgment that property shall be condemned and such determination can be received only upon an appeal from the confirmation of the report of the commissioners as to the amount of compensation to be paid. *Village of St. Johnsville v. Smith*, 61 App. Div. 380, 70 Supp. 880.

The question of lack of jurisdiction of commissioners of appraisal to dismiss proceedings before them can be first raised on appeal. *Matter of Caffrey*, 52 App. Div. 264, 65 Supp. 470.

An appeal will be allowed from the order under the Condemnation Law when the objections are jurisdictional; otherwise it is not permissible. *Matter of City of Rochester*, 102 App. Div. 99, 92 Supp. 478.

An order denying a motion to confirm a report of commissioners

in proceedings to acquire land for the construction of a bridge, under Laws of 1894, chapter 147, which returns the report to the commissioners for amendment and correction is not appealable to the Appellate Division, as the authority to entertain such appeals only exists when there has been an order of confirmation of the report in whole or in part. *Matter of Commissioners of Public Works*, 185 N. Y. 391, aff'g 111 App. Div. 285, 97 Supp. 503.

In a proceeding for the appointment of commissioners of assessment of the expense of raising the roadbed of the New York & Harlem railroad, the owner of the property "within the possible area of assessment herein" has no standing to appeal on behalf of others in interest. *Matter of City of New York*, 77 App. Div. 136, 78 Supp. 1030. *Held*, further, that until the commissioners have determined to assess the cost upon specific property, no person is aggrieved and no appeal at the instance of the proper owner from the order appointing the commissioners.

In a street opening proceeding instituted by the city of New York, commissioners may be appointed to estimate the damages of consenting landowners, although another landowner denies the necessity for taking its land and also the power to acquire it, and such objecting landowner cannot appeal from an order appointing commissioners. *Matter of East 161st St.*, 52 App. Div. 478, 65 Supp. 77.

An appeal by a railroad company from the order confirming the report of commissioners in a proceeding to lay out and open a street across a railroad does not bring up the question whether the proceeding is invalid under the Grade Crossing Law, and there is no appeal from the order appointing the commissioners, and there is nothing in the appeal to bring up that order for review. *Matter of Ludlow Street*, 47 App. Div. 317, 62 Supp. 42.

Where all of the property-owners consented to the proposed street, except one who filed an answer, it was held the latter had no right to appeal from the order appointing the commissioners, when the order reserved for trial the issues raised, and did not authorize any act in relation to the property of the answering party, such party not being aggrieved. *Matter of Mayor*, 52 App. Div. 478, 65 Supp. 77.

A determination by a common council that it is necessary to lay out an avenue over the tracks of a railroad company, is appealable to the Appellate Division. *Matter of Delevan Avenue*, 167 N. Y. 256, aff'g 54 App. Div. 629, 66 Supp. 1128.

Where a city, pursuant to chapter 182, Laws of 1898, discontinued an alley and applied to have damages sustained by the abutting owners ascertained by proceedings under the Condemnation Law, it was held that the order overruling preliminary jurisdictional objections to such proceeding was appealable to the Appellate Division. *Matter of City of Rochester*, 102 App. Div. 99, 92 Supp. 478.

An order appointing commissioners to assess damages in proceedings for extending a street is a special proceeding within section 3240, providing that costs on appeal in special proceedings taken to a court of record may be awarded to a party in the discretion of the court at rates allowed for similar services in actions. *Matter of South Market Street*, 80 Hun, 246, 29 Supp. 1030.

Under the Railroad Law, sections 61 and 62, a determination of the common council that it is necessary to lay out an avenue over the tracks of a railroad company is appealable to the Appellate Division. *Matter of 19th St.*, 66 App. Div. 618, 72 Supp. 845, 170 N. Y. 576.

Subd. 3. Appeals to Court of Appeals. §§ 190, 191.

§ 190. The jurisdiction of the Court of Appeals in civil actions.

The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a General Term of the Supreme Court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the Court of Appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the Supreme Court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the Supreme Court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the appellate division its determination upon such questions.

§ 191. Limitations, exceptions and conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the su-

preme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. (See § 2261.)

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefore, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals. (See § 791, subd. 12; § 1310.)

3. The jurisdiction of the court is limited to a review of the questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals. (See § 1337.)

The Constitution authorizes appeals from orders finally determining special proceedings. (Article 6, section 9.) Code, section 190, also authorizes appeals from orders finally determining special proceedings, and also from the determination of the Appellate Division where that court certifies questions of law. The latter provision is applicable to special proceedings as well as to actions. *Matter of Davies*, 168 N. Y. 89 (96).

The purpose of the amendment to the Constitution and the Code was to limit the right of appeal to the Court of Appeals, and the language employed should be construed with that purpose in view. *People v. American L. & T. Co.*, 150 N. Y. 117.

In *Merriam v. Wood & Parker Lithographing Co.*, 155 N. Y. 136, it is said that there is some confusion in the cases with respect to the question as to what is or is not a final order in a special proceeding, citing *Gilig v. Treadwell Co.*, 151 N. Y. 552; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521; *Einstein v. Climax Cycle Co.*, 152 N. Y. 648; *Townsend v. Chapin*, 152 N. Y. 649.

In *Van Arsdale v. King*, 155 N. Y. 325, it is said that the provisions of section 190 that "appeals may be taken as of right to said court from judgments or orders finally determining actions or special proceedings" seem to be very plain. That there cannot be such a thing as an order which determines an action, that they can only be determined by final judgments, and that the words finally determining qualify the nature of both the judgments or orders

which may be appealed from, and hence the judgment must be a final judgment and the order a final order, and the order must be a final order in a special proceeding. An appeal is not allowed from an order in an action even though it ends the litigation.

A final order which is appealable as such must be an adjudication upon a motion or other application completely disposing of the subject-matter and of the rights of the parties. *People v. American L. & T. Co.*, 150 N. Y. 117.

An order for the distribution of surplus moneys arising upon foreclosure of a mortgage by action is a final order in a special proceeding and reviewable in the Court of Appeals. *Velleman v. Rohrig*, 193 N. Y. 439, aff'g 127 App. Div. 692.

An application to the Supreme Court on petition by a life tenant to compel payment of income to him by trustees is a special proceeding and the final order made therein is appealable to the Court of Appeals. *Matter of Ungrich*, 201 N. Y. 415, rev'g 140 App. Div. 930.

An order discharging a receiver upon the petition of a purchaser of property not a party to the action in which the receiver was appointed, *held*, a final order in a special proceeding and reviewable in the Court of Appeals. *Conlon v. Kelly*, 199 N. Y. 43, rev'g 136 App. Div. 940.

An order made by a justice of the Supreme Court and affirmed by the Appellate Division determining the result of a summary investigation into the financial affairs of a village, instituted by taxpayers and freeholders under the General Municipal Law, section 3. (Chap. 685, L. 1892), is reviewable by the Court of Appeals as a final order in a special proceeding. *Matter of Taxpayers of Plattsburgh*, 157 N. Y. 78; rev'g 27 App. Div. 353.

The Public Service Commission is authorized to appeal to the Court of Appeals from an order annulling its determination denying an application for permission to construct and operate an extension to a railroad. *People ex rel. South Shore Traction Co. v. Willcox*, 196 N. Y. 212, aff'g 133 App. Div. 556.

An order of the Appellate Division finally determining a proceeding by mandamus, under section 114 of the Election Law (L. 1896, chap. 909), for a recount of ballots, objected to as marked for identification, or rejected as void, and presenting a question of law for review, is appealable as of right to the Court of Appeals as an order finally determining a special proceeding. *People ex rel. Feeney v. Bd. of Canvassers*, 156 N. Y. 36.

An order of the Appellate Division reversing an order in a proceeding under section 2471a to compel the delivery of official books and papers and denying the application is a final order in special proceeding and reviewable in the Court of Appeals. *Matter of Brenner*, 170 N. Y. 185, aff'g 67 App. Div. 375, 73 Supp. 689.

An order of Special Term charging the committee of an incompetent with a certain sum on the report of the referee is a final order in a special proceeding, and is governed by the same rules as are appeals from judgments. *Matter of Chapman*, 162 N. Y. 456, 31 Civ. Pro. 57.

An order of the Appellate Division compelling the Board of Railroad Commissioners to grant a certificate of public convenience and necessity requiring the construction of a railroad is a final order in a special proceeding and is reviewable in the Court of Appeals as a matter of right. *Matter of Wood*, 181 N. Y. 93, aff'g 99 App. Div. 334, 91 Supp. 225.

An order and judgment entered on the decision of the Appellate Division reversing an order and judgment of the Special Term and condemning water rights and dismissing the proceeding are appealable to the Court of Appeals. *Village of Champlain v. McCrea*, 165 N. Y. 264, rev'g 33 App. Div. 259, 53 Supp. 1096.

A final order in a proceeding for the voluntary dissolution of a corporation is appealable to the Court of Appeals. *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9, rev'g 38 App. Div. 323, 57 Supp. 38.

An order in the Appellate Division affirming a decree of the Surrogate's Court judicially settling the account of executors and trustees is a final order in a special proceeding appealable to the Court of Appeals, though the accounting be an intermediate one. *Matter of Prentice*, 160 N. Y. 568.

An order in a special proceeding instituted by a property-owner to review an assessment levied for a local improvement which sets aside the assessment not only as to him but as to all the property-owners is a final order determining the proceeding and is appealable to the Court of Appeals. *Matter of Munn*, 165 N. Y. 149, rev'g 49 App. Div. 232, 63 Supp. 22.

An order of the Appellate Division modifying an order confirming a report of a referee allowing the account of an assignee for creditors is a final order in a special proceeding, although the estate was not then ready for distribution, and appealable to the Court of Appeals. *Matter of Talmage*, 160 N. Y. 512.

An order of the Appellate Division affirming an order of the Special Term, which vacated a former order appointing a trustee under a will in place of a deceased trustee, is a final order in a special proceeding, and therefore may be appealed from to the Court of Appeals. *Matter of Earnshaw*, 196 N. Y. 330, rev'g 131 App. Div. 915.

An order of the Appellate Division permitting an order directing the guardian of an infant's property to pay certain allowances to the guardian of the infant's person is not appealable to the Court of Appeals as a matter of right. *Matter of White*, 95 App. Div. 104.

An order providing for the punishment of a witness for contempt for refusing to disclose information not privileged is a final order reviewable by the Court of Appeals. *Matter of King v. Ashley*, 179 N. Y. 281, aff'g 96 App. Div. 143, 89 Supp. 482.

An order of the Appellate Division reversing an order reducing the amount of alimony and denying the application is either a final order in a special proceeding or a final judgment in an action, and in either case is appealable to the Court of Appeals. *Wetmore v. Wetmore*, 162 N. Y. 103.

An order of the Special Term confirming in part the report of commissioners which determines the value of certain property in condemnation proceedings in the city of New York is appealable to the Appellate Division, although the report of the commissioners has not been disposed of so that there may be a confirmation as to all the claims in the proceeding. The order of the Appellate Division in such case is reviewable by the Court of Appeals. *Matter of City of New York*, 182 N. Y. 281, aff'g 101 App. Div. 527, 92 Supp. 8.

An order of the Appellate Division reversing an order of the Special Term appointing commissioners to ascertain and determine the amount of damage received by reason of change of grade is a final order and appealable to the Court of Appeals. *Matter of Torge v. Village of Salamanca*, 176 N. Y. 324, rev'g 86 App. Div. 211, 83 Supp. 672.

An order in condemnation proceedings modifying and correcting a prior order in the proceedings is a final order and appeal lies to the Court of Appeals therefrom. *Matter of Board of Education*, 169 N. Y. 456, rev'g 59 App. Div. 258, 69 Supp. 572.

Where in certiorari proceedings to review the removal of a policeman, counsel entered an order by consent reinstating the relator on his stipulation not to claim back salary, the order is not final and not reviewable in the Court of Appeals. *People ex rel. Hart v.*

York, 169 N. Y. 452, dismissing appeal, 65 App. Div. 609, 72 Supp. 1123.

An application by a purchaser at a foreclosure sale to be relieved from his bid is a special proceeding, and a determination thereof is reviewable in the Court of Appeals. If it involves questions of fact or the exercise of discretion, these questions cannot be reviewed, but when it presents solely questions of law their examination is open in the Court of Appeals. *Parish v. Parish*, 175 N. Y. 181, rev'g 77 App. Div. 267, 78 Supp. 1089, 12 Anno. Cas. 208.

Service of a notice of appeal to the Court of Appeals from an order other than a final order in a special proceeding is a nullity, and the appeal is not validated by a subsequent order of the Appellate Division granting leave to appeal. *Steamship Richmond Hill Co. v. Seager*, 160 N. Y. 312.

Where the Appellate Division reviewing the determination of the State Comptroller assessing a franchise tax upon a corporation differs from the Comptroller, not only as to the amount of property held within this State but as to the character of a part of it, a legal question is presented which is reviewable in the Court of Appeals. *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, rev'g 86 App. Div. 577.

Where the trial of the issues arising upon the application for the writ of mandamus is so informal and irregular that a review upon the merits is impossible, the Court of Appeals will reverse the order of the lower courts and direct a new trial. *People ex rel. Berlinger v. Wells*, 178 N. Y. 411, rev'g 85 App. Div. 378.

Upon an appeal from an order of the Appellate Division reversing, upon certiorari, proceedings of a town board, the fact that the decision was unanimous does not deprive the Court of Appeals of jurisdiction to review the order. *People ex rel. Village of Brockport v. Sutphen*, 166 N. Y. 163, modif'g 53 App. Div. 613.

This case also points out the respects in which a unanimous reversal differs from a unanimous affirmance in that the latter necessarily involves the conclusion that there was sufficient evidence to sustain the facts, whereas the former may be based upon the facts as well as the law, although if the decision does not state in express terms the court is obliged to presume, for the sole purpose of reviewing the questions of law, that it was on the law only. *Held*, further, that section 1338 is not applicable to such an appeal but is limited to appeals from judgments entered upon the report of a referee or a determination in a trial court, or from the order granting a new trial.

The following are not appealable to the Court of Appeals:

An order reversing with costs a county judge's order denying an application to punish a party for contempt and remitting the matter involved to the county judge to proceed. *Crosby v. Stephan*, 97 N. Y. 606.

An order of reference to take proofs touching an application by the Attorney-General to dissolve an insurance company. *Matter Attorney-General v. Continental Life Ins. Co.*, 68 N. Y. 343.

An order of General Term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners. *Matter of N. Y., W. S. & B. R. Co.*, 94 N. Y. 287.

An order of General Term reversing an order of Special Term, which confirmed a report of a referee appointed to determine conflicting claims to surplus moneys arising on foreclosure sale, and ordering a new hearing before another referee. *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57.

An order which affirmed an order of the Special Term granting upon conditions a motion to set aside two orders is not a final order in a special proceeding, but an order made in an action and not reviewable in the Court of Appeals. *Murphy v. Walsh*, 169 N. Y. 595.

An order vacating and setting aside an *ex parte* order discharging an assignee for the benefit of creditors and his sureties from all liability to the creditors, and cancelling the bond. *Matter of Horsfalls*, 77 N. Y. 514.

Under section 190 of the Code of Civil Procedure no appeal lies to the Court of Appeals from an order denying a "motion herein to vacate and set aside the warrants of attachments and . . . judgment in this action" without the allowance of the Appellate Division, since it is an appeal from an order in an action and not in a special proceeding. *Hammond v. National Life Assn.*, 168 N. Y. 262.

Upon an appeal from an order of Special Term confirming an award of commissioners appointed to appraise lands taken by a railroad company, the General Term reversed the order of Special Term and ordered a new appraisal before the same commissioners. *Held*, that the order was not final. *Code Civ. Pro.*, § 190, subd. 3; *Matter of Southern Boulevard Railroad Co.*, 128 N. Y. 93.

The proceeding to punish the defendant in an action for contempt to enforce a civil remedy, instituted by an order to show cause, is a proceeding in the action and not a special proceeding; and an order made therein, even if final, not being made in a special proceeding is not appealable as of right to the Court of Appeals. *Ray v. N. Y. Bay Extension R. R. Co.*, 155 N. Y. 102, dismissing appeal, 20 App. Div. 539, 47 Supp. 301.

A proceeding to punish a party for contempt, instituted by an order to show cause, to enforce the judgment in an action, is a proceeding in the action and not a special proceeding (*Code Civ. Pro.*, § 2273); and therefore a final order made therein is not appealable as of right to the Court of Appeals. § 190; *Jewelers' Mer. Agency v. Rothschild*, 155 N. Y. 255.

A proceeding to punish for an alleged criminal contempt originating in the violation of an order granted in a civil action is a civil special proceeding within the meaning of the Code, and an order therein finding the party proceeded against, guilty, and imposing a punishment is reviewable in the Court of Appeals. But where a criminal court makes an order in a criminal proceeding pending before it, which is disobeyed, the process by which it vindicates its authority is not a special proceeding. *People ex rel. Negus v. Dwyer*, 90 N. Y. 402, dist'g *People v. Gilmore*, 88 N. Y. 627.

A purchaser at a judicial sale finds title defective and refuses to complete his purchase, the court may award or withhold such compensation as in its judgment and discretion appears to be equitable as between the parties, and the exercise of such discretion is not reviewable in the Court of Appeals. *People v. Building Loan Banking Co.*, 189 N. Y. 233.

The Court of Appeals has no power to review an order of the Appellate Division affirming an order of a County Court denying a motion made by a board of supervisors to have the County Court set aside a presentment of a grand jury censuring them for their alleged neglect in keeping proper records of the minutes of their proceedings, since the motion was not made in an action, either civil or criminal, and is not a motion in a civil or criminal proceeding authorized by any statute. *Matter of Jones*, 181 N. Y. 389, dismissing appeal, 101 App. Div. 55.

A proceeding in the Appellate Division for the removal of a city magistrate of the city of New York is not a special proceeding, and an appeal therein does not lie to the Court of Appeals as matter of right under the provisions of section 190 of the Code of Civil

Procedure. *Matter of Droege*, 197 N. Y. 44, dismissing appeal, 129 App. Div. 866.

To render a review by the Court of Appeals effective, an order of the Appellate Division reversing an order adjudging one guilty of criminal contempt should show on its face that the reversal was solely on the law. *People ex rel. Drake v. Andrews*, 196 N. Y. 538, dismissing appeal, 134 App. Div. 32.

An order of the Appellate Division, reversing an order vacating an execution against the person of the judgment debtor, is not a final order in a special proceeding. *The Steamship Richmond Hill Co. v. Seager*, 160 N. Y. 312.

An order granting a motion for the resettlement of a judgment is not a final order in a special proceeding and is not appealable to the Court of Appeals. *Whalen v. Stuart*, 194 N. Y. 495, rev'g 123 App. Div. 446, dismissing *Duke v. Stuart*, 115 App. Div. 898.

An ordinary application to compel a defaulting purchaser at a foreclosure sale to execute a deed of the property bid off to a purchaser on a resale, where there is no question concerning the identity of the property covered by the judgment and included in the sale, is not a special proceeding, and where there is property which is not covered by the judgment in foreclosure, the Supreme Court is not compelled to determine such adverse claims in a summary manner upon petition, but may leave the claimant to enforce his rights by action and the denial of the relief sought is the exercise of a discretionary power, which is not reviewable in the Court of Appeals. *Knickerbocker Trust Co. v. Oneonta, etc., R. R. Co.*, 197 N. Y. 391, dismissing appeal, 134 App. Div. 775.

The Court of Appeals has not jurisdiction to review the discretion of the Supreme Court in determining the mode of trial of a proceeding for the discharge of the committee of an insane person. *Matter of Curtiss*, 199 N. Y. 36, aff'g 137 App. Div. 584.

An order of the Appellate Division sustaining a writ of certiorari to review the action of the Public Service Commission in denying an application for leave to issue stock and bonds for corporate purposes, and directing that the determination be annulled and the application be referred back to the Commission for action within the limits of its authority, is not a final order, and so is not appealable to the Court of Appeals. *People ex rel. Long Acre, etc., v. Public Service Commission, etc.*, 199 N. Y. 254, dismissing appeal, 137 App. Div. 810.

An order of reference to take proof as to charges made by cred-

itors against an assignee for the benefit of creditors is not reviewable here, as it is an order, not final, made in a special proceeding. *Code*, § 190, subd. 3; *Matter of Friedman*, 82 N. Y. 609.

The orders granting new trials on exceptions, of which a review is permitted in the Court of Appeals, where the appellants stipulate for judgment absolute in the event of affirmance, are only such as grant new trials in actions and do not include orders granting new hearings in special proceedings. *Matter of Gibson*, 195 N. Y. 466, dismissing appeal, 128 App. Div. 769.

The Court of Appeals is without jurisdiction to review an order of the Appellate Division affirming an order appointing commissioners to ascertain the damages caused by a change of grade of a village street, because it is not a final order in a special proceeding. *Matter of Grabb*, 157 N. Y. 69, dismissing appeal, 31 App. Div. 610, 52 Supp. 395.

An order made upon the petition of a claimant against a receiver in an action for the foreclosure of a railroad mortgage is not a final order in a special proceeding and not appealable to the Court of Appeals. *Guarantee Trust & Safe Deposit Co. v. Philadelphia, Reading, etc., Co.*, 160 N. Y. 1.

Where a Special Term order refusing a mandamus does not state the ground of refusal and the facts would justify a refusal, as matter of discretion, it is not reviewable in the Court of Appeals, although the affirmance by the Appellate Division is expressly based on the question of law involved. *Matter of Hart*, 159 N. Y. 278.

The Court of Appeals cannot review an order denying a motion for a mandamus where the court below had discretionary power on the facts to refuse it. *People ex rel. Steinson v. Board of Education*, 158 N. Y. 125, aff'g 20 App. Div. 452.

An order of the Surrogate's Court denying an application to open a decree entered in a proceeding for the final settlement of the executor's accounting and to require a further accounting, is not an order "finally determining" the special proceeding, and an order of the Appellate Division affirming the same is not appealable as of right to the Court of Appeals. *Matter of Small*, 158 N. Y. 128.

In a proceeding for the disbarment of an attorney the power of review ends in the Court of Appeals when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it. *Matter of Goodman*, 199 N. Y. 143, aff'g 135 App. Div. 594.

Where on a motion to punish for contempt in violating an injunc-

tion order there is evidence sufficient to call for the exercise of the discretion of the court, the decision is not reviewable by the Court of Appeals. *Mayor v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622.

In *Brinkley v. Brinkley*, 47 N. Y. 40, it is held that if the order is conditional and the punishment not inflicted, but it is in the power of the defendant to avert it, it is not a final order and so is not appealable.

Proceedings to punish a witness for contempt in failing to give testimony for use in an action pending in another State constitute a special proceeding, but an order which merely directs the witness to answer specified questions is interlocutory in its character and is not appealable to the Court of Appeals. *Strong v. Randall*, 177 N. Y. 400.

An order of the Appellate Division reversing an order of Special Term made on motion to determine whether a fund in question was covered by the lien of a mortgage being foreclosed is not a final order in a special proceeding, but an order in a foreclosure action, and not appealable to the Court of Appeals as a matter of right. *New York Security & Trust Co. v. Saratoga, G. & E. L. Co.*, 156 N. Y., dismissing appeal, 30 App. Div. 80.

An order in a proceeding by a writ of habeas corpus to obtain the custody of a child, which merely denies a motion to dismiss the writ and directs the defendant to produce the child at a Special Term of the court, and in the event of the failure of the defendant to do so directs the issue of a warrant for the contempt of the defendant on proof of disobedience, is not appealable to the Appellate Division under the terms of Code of Civil Procedure, section 2058, but where the appellate division assumes jurisdiction and reverses the order appealed from and makes a final order dismissing the proceeding, the latter order is appealable to the Court of Appeals, which will be required to reverse the order of the Appellate Division and reinstate the original order which the latter had no power to review. *People ex rel. Duryee v. Duryee*, 188 N. Y. 440, rev'g 109 App. Div. 533.

An order of the Appellate Division reversing an order of the Special Term which quashed a writ of certiorari to review an assessment, and reinstated such writ and sent the case back to the Special Term for decision upon its merits is not a final order determining a special proceeding and not appealable to the Court of Appeals. *People ex rel. Bronx Gas & E. Co. v. Barker*, 155 N. Y. 308, dismissing appeal, 22 App. Div. 161, 47 Supp. 1020.

An order of the Appellate Division reversing an order of the Special Term vacating a final order or judgment in condemnation proceedings is not a final order in special proceedings within the meaning of the Constitution and section 190 of the Code, and so not appealable as of right to the Court of Appeals. *City of Johnstown v. Wade*, 157 N. Y. 50, dismissing appeal, 30 App. Div. 5.

For other authorities bearing upon the question of appeals from orders in special proceedings see authorities collated under article I. as to what are special proceedings; and also under article III. enumerating special proceedings.

Application by a bankrupt for discharge from a judgment is a special proceeding and appealable to the Court of Appeals. *Guasti v. Miller*, 203 N. Y. 259.

Subd. 4. What May Be Reviewed; Stay of Proceedings; Practice. §§ 1358, 1359, 1360, 1361.

§ 1358. Preceding order may be reviewed.

An appeal, authorized by this title, brings up for review, any proceeding order made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

§ 1359. Limitation of time to appeal.

An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney-at-law or an attorney-in-fact, upon the person who so appeared for him.

§ 1360. Stay of proceedings; hearing of appeal; decision thereupon.

The provisions of title fourth of this chapter, relating to perfecting an appeal from an order, taken as therein prescribed; to staying the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title, except as otherwise specially prescribed by law.

§ 1361. This title qualified. Application of provisions relating to actions.

This title does not confer the right to appeal from an order, in a case, where it is specially prescribed by law, that the order cannot be reviewed. The proceedings upon an appeal, taken as prescribed in this title, are governed by the provisions of this act, and of the general rules of practice, relating to an appeal in an action, except as otherwise specially prescribed by law.

It was held before the present Code that the intention of the Legislature was to assimilate appeals in special proceedings to those from judgments. *Rochester Water-Works v. Wood*, 60 Barb. 137; *Matter of Anderson*, 60 N. Y. 457.

In *People v. Young*, 92 Hun, 373, it is held that where an order was made in a special proceeding, although in a Court of Special Sessions, it might, in view of the purpose of the motion, be

deemed to be made in a civil special proceeding as distinguished from a criminal proceeding, and so be appealable.

It seems that the distinction between proceedings instituted at Special Term and those instituted at chambers is disregarded in the Code of Civil Procedure by section 1356 and the succeeding section. *Matter of Jetter*, 78 N. Y. 601.

When in special proceeding in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact in such proceedings, having particular qualifications, or occupying some peculiar relations to the parties or subject-matter, such acts when done are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose, and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. *Porter v. Purdy*, 29 N. Y. 106.

Defendant on appeal from an order of dispossession taken on his default may raise the objection that the conventional relation of landlord and tenant did not appear from the petition, although he appeared in court on one of the adjourned days. *Dreyfus v. Carroll*, 28 Misc. 222, 58 Supp. 1116.

An appeal from an order in a special proceeding, not final, does not bring up intermediate orders for review. *Oneonta, Coopers-town, etc., Ry. Co. v. Cooperstown & Charlotte Valley R. R. Co.*, 85 App. Div. 284, 83 Supp. 307.

Upon an appeal from an order directing a peremptory writ of mandamus granted after trial of the issues in a proceeding for an alternative writ, the only questions before the Appellate Division are such as are raised by exceptions taken at the trial. *People ex rel. Ging v. Lyman*, 46 App. Div. 312, 61 Supp. 655.

The Appellate Division has no power to reverse an order of the county judge directing the discharge of a prisoner under a writ of habeas corpus, on questions of law only, unless all the jurisdictional facts necessary to retain the petitioner were admitted or conclusively established. *Matter of Depue*, 185 N. Y. 60, rev'g 108 App. Div. 58, 95 Supp. 1017.

The fact that a board of supervisors obeyed a peremptory writ of mandamus and an order was entered that the proceeding was terminated does not deprive the board of the right to appeal from the order granting the writ. *People ex rel. Lawrence v. Board of Supervisors of Delaware Co.*, 48 App. Div. 428, 63 Supp. 317.

Where the trial of issues on an alternative writ of mandamus was

had before the court without a jury, it was held that the exceptions to the findings of fact were brought up for review by an appeal from the final order entered in the proceeding, and that a motion for an order to set aside or for a new trial, as in case of the verdict of a jury, was not requisite in order to procure a review of the facts. *People ex rel. Berlinger v. Wells*, 85 App. Div. 378, 83 Supp. 376; rev'd, 178 N. Y. 411.

The stay under section 1360 can only be by order, and if security is required the provisions of title 2, chapter 12 apply. *Ryan v. Webb*, 39 Hun, 436.

Undertaking for staying execution upon appeal in special proceedings must be in the form prescribed by section 1327, for staying an appeal from an order directing the payment of a sum of money, as the provisions of this section are rendered applicable to a stay of proceedings on appeal in special proceedings by sections 1351 to 1360. *In re Ciancimino*, 26 Abb. N. C. 48, 13 Supp. 856; judgment aff'd; 59 Hun, 622, 14 Supp. 938.

It was said in *Matter of Kings Bridge Road*, 5 Hun, 146, that an appeal from an order of the Special Term, confirming the report of commissioners of estimate and assessment, brings up for review only those questions which were discussed below. See also *Haviland v. White*, 7 How. 154. But in *Matter of Petition of Livingston*, 34 N. Y. 555, it is held, that on an appeal from an order in a special proceeding, it is in the power of the court to examine the whole proceeding, and the language of the section is in accordance with that decision.

Errors arising in the course of the trials of issues of facts and submitted to the jury in mandamus proceedings, or in the proceeding, may be reviewed on appeal from the order directing a peremptory mandamus. *People ex rel. Boyd v. Hertle*, 46 App. Div. 505, 61 Supp. 965.

It is settled in this court by authority that in special proceedings an objection that such proceeding is barred by the Statute of Limitations must be taken in the court below, and it cannot be interposed for the first time in the appellate tribunal. It must have been raised and passed upon by the court below, or it will be deemed to be waived. *People ex rel. Ehrlich v. Grant*, 61 App. Div. 238 (241).

The reversal of judgment in condemnation proceedings at the instance of several riparian owners. Held, not to inure to the benefit of one who did not appeal. *Weeks-Thorne Paper Co. v. City of Syracuse*, 139 App. Div. 853, 124 Supp. 317.

An order entered in a special proceeding determining the merits after hearing all the contestants is as final and conclusive on the litigants and privies as though the same question had been determined in an action. *Matter of Barkley*, 42 App. Div. 597 (610), 59 Supp. 742; appeal dismissed, 161 N. Y. 647.

A special proceeding terminates, not in a judgment, but in a final order, and a plaintiff may sue upon a final order made in a special proceeding establishing of record the fact of an indebtedness to him. *Fenlon v. Paillard*, 46 Misc. 151.

ADOPTION OF CHILDREN.

DOMESTIC RELATIONS LAW, §§ 110-118.

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ARTICLE I.

VOLUNTARY ADOPTION AND ABOGATION. §§ 110-116.

Subd. 1. Statutory provisions, 62.

§ 110. (Formerly § 60) *Definitions; effect of article, 62.*

§ 111. (Formerly § 61) *Whose consent necessary, 62.*

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§ 116. (Formerly § 66) *Abrogation of voluntary adoption, 63.*

Subd. 2. Procedure on adoption, 65.

Subd. 1. Statutory Provisions. §§ 110-113, 116.**§ 110. (Formerly § 60). Definitions; effect of article.**

Adoption is the legal act whereby an adult takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his wife together, may adopt a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent, applies to any will, devise, or trust, made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes, or interferes with such will, devise, or trust, and as to any such will, devise, or trust, a child adopted before that date is not an heir so as to alter estates or trusts, or devises in wills so made or created.

§ 111. (Formerly § 61). Whose consent necessary.

Consent to adoption is necessary as follows:

1. Of the minor, if over twelve years of age;
2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor;
3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect is unnecessary.
4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.

§ 112. (Formerly § 62). Requisites of voluntary adoption.

In adoption the following requirements must be followed:

1. The foster parent or parents, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents resides, and be examined by such judge or surrogate, except as provided by the next subdivision.
2. They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parent or parents to adopt and treat the minor as his, her, or their own lawful child, and a statement of the age of the child, as nearly as can be ascertained; which statement shall be taken prima facie as true. The instrument must be signed by the foster parent or parents and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before such judge or surrogate; but where a parent or person or

institution having the legal custody of the minor resides in some other country, State or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this State, is equivalent to his or their appearance and execution of such instrument.

§ 113. (Formerly § 63). Order.

If satisfied that the moral and temporal interests of the child will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefor, and directing that the minor shall thenceforth be regarded and treated in all respects as a child of the foster parent or parents. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such county.

§ 116 (Formerly § 66). Abrogation of voluntary adoption.

A minor may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the minor and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the minor, the foster parent, the minor, and the persons whose consent would have been necessary to an original adoption shall execute an agreement whereby the foster parent and the minor agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the child or the institution having the custody thereof, agree to re-assume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardians reside, or such institution is located, if they reside, or such institution is located, within this State. From the time of the filing and recording thereof, the adoption shall be abrogated, and the child shall reassume its original name and the parents or guardians of the child shall reassume such relation. Such child, however, may be adopted directly from such foster parents by another person in the same manner as from parents, and as if such foster parents were the parents of such child.

It is said in note to *Godine v. Kidd*, 29 Abb. N.C. 366 (49), 19 Supp. 335, that "the statute of adoption is one of the curiosities of our legislation. Its provisions as to inheritance and succession were apparently aimed at curing one supposed defect in the common law. The change was made without any apparent regard to the number of embarrassing uncertainties which would be introduced by drafting a statute with that purpose alone in view, in disregard of other necessarily connected rules of law."

Adoption was unknown to the common law of England and exists in this country only by virtue of statute. The adoption of children

and strangers to the blood was, however, known to the Athenians and Spartans, to the Romans and to the Germans; and the provisions of the Roman law, as modified by Justinian, were transmitted to the modern nations of Europe, and appear in the Code Civil of France and in the Spanish law. *Matter of Thorne*, 155 N. Y. 143, citing 31 Cent. L. J. 66.

In *Matter of Huyck*, 49 Misc. 391, 99 Supp. 502, the rule is reiterated that the adoption of minors is recognized only under the statute and not at common law.

There is no presumption that children living with people whose name they have taken have been adopted. The presumption is raised, however, that there were no adoption papers by their absence from the office where, if in existence, they should have been filed. *Matter of Huyck*, 49 Misc. 391, 99 Supp. 502.

The first statute of this State was chapter 830 of the Laws of 1873, which defined adoption to be "the legal act whereby an adult person takes a minor in the relation of child and thereby acquires rights and incurs responsibilities of a parent in respect to such minor." This act was amended by chapter 703 of the Laws of 1887, and both acts were repealed by the Domestic Relations Law (chapter 272 of the Laws of 1896).

Special statutes had also been enacted prior to that time authorizing charitable institutions to place children committed to their care with persons who consented to take them by adoption. All of these statutes have been consolidated in the present law.

As regards the constitutionality of a statute authorizing adoption, it has been held that the fact that such statute, as one of its incidents, changed the descent and devolution of property, does not render it invalid unless it defeats vested rights. *Sewald v. Roberts*, 115 Mass. 262. The constitutionality of such acts has also been passed upon in respect to their compliance with various State Constitutions in *Nugent v. Powell*, 33 Pac. Rep. 23; *In re Stevens*, 83 Cal. 322; *State v. Meyer*, 63 Ind. 33; *In re Jessop's Estate*, 81 Cal. 408; *People v. Congdon*, 77 Mich. 351.

It was said in *Henley v. Supreme Tent, Knights of Maccabees*, 38 Misc. 161, 77 Supp. 246, that the term "adopted children" has a broader significance in expressive language as used than the mere inclusion of those who have been taken in through the stated form of statutory law. It was held in that case that illegitimate children of a man insured in a benefit order, described by him in the application as his adopted children and whom he had supported for years at

the home of their mother, are entitled upon his death to recover under a certificate limited as to beneficiaries to wife, children, "dependents," or blood relatives, as they are "dependents."

A child taken from a charitable institution by a man and his wife and treated in all respects as an adopted child, but not formally adopted pursuant to the statute, is not an heir-at-law of the foster parents, although they agreed to leave her all their property. *Hawkes v. Warren*, 140 App. Div. 712.

In a proceeding instituted by a father by writ of habeas corpus to secure the custody of his infant child, an order of adoption of the child by the respondents is ineffectual to prevent the court from disposing of the custody of the infant so as to promote his best interests. *People ex rel. Cornelius v. Callan*, 69 Misc. 187, 124 Supp. 1074.

Where an officer of a home for poor and orphan children leaves one of its inmates with the head of a family to be taken care of while satisfactory, but without any of the formalities required by statute for binding out destitute children as apprentices or their adoption, the person taking the child does not stand in the relation of master, parent, or guardian to him, and is liable to him for the value of any services he renders. *Manuel v. Beck*, 70 Misc. 357.

In *Merchant v. White*, 37 Misc. 376, 75 Supp. 756, it was held, that the evidence as to an alleged adoption was so meager, indefinite, and too much in conflict with the written agreement to justify the granting of a specific performance. Aff'd in 77 App. Div. 539, 79 Supp. 1, where it is held, that a child, taken into a family and brought up therein as a child of the family without a formal adoption, is not entitled to share in the proceeds of an insurance policy issued upon the life of her foster father and payable to his heirs-at-law.

Subd. 2. Procedure on Adoption.

A parent who has consented to the adoption cannot avoid it by objections going merely to informalities, not affecting his consent, such as the failure of the judge to subscribe the consent and agreement of the person adopted. Precise compliance with the terms of such a statute is not essential. *People ex rel. Burns v. Bloedel*, 4 Supp. 110, 20 St. Rep. 161.

An adoption within the saving clause of chapter 830 of the Laws of 1873, as amended by chapter 703 of the Laws of 1887, relates to adoptions previously made, according to any method practiced in the State, is not shown, where it appears that the only written evi-

dence of an adoption was an entry in a book kept by a charitable society, to the effect that a child was adopted by the testator, although he took her from the society and kept her in his home until her marriage, treating her in every respect as a daughter, and refers to her in his will as his adopted daughter. *Smith v. Allen*, 161 N. Y. 478.

It is only in cases where the child sought to be adopted was abandoned after chapter 830, Laws of 1873, went into effect that the person adopting the child must, under section 2 of that act, proceed to adopt it within six months after he or she has assumed the maintenance thereof. *Von Beck v. Thomsen*, 44 App. Div. 373, 60 Supp. 1094; aff'd in 167 N. Y. 601.

Discretionary power is clearly given by section 63 of the Domestic Relations Law, which provides that if satisfied that the moral and temporal interests of the child will be promoted thereby the judge or surrogate must make the order. "The words "if satisfied" are a clear ground of discretionary power. *Matter of Ward*, 59 Misc. 328.

There is no provision in our statutes relating to adoption which requires notice to the heirs-at-law and next of kin of the minor or otherwise, except as it is included within the provisions of section 61 of the Domestic Relations Law, which provides for the consent of the persons therein named. *Matter of MacRae*, 189 N. Y. 142, aff'g 118 App. Div. 907.

Upon a second adoption of a child the consent of the natural parents or notice to them is not required, but such consent must be given by the foster parents or the survivor of them. The adoption divests the natural parents of the relation which they had theretofore sustained toward the infant and such change of relation is in no way affected by the death of the foster parent or parents. *Matter of MacRae*, 189 N. Y. 142, aff'g 118 App. Div. 907.

In *Matter of Gregory*, 13 Misc. 365, 35 Supp. 105, it is held, that it is not necessary to the validity of an adoption of an illegitimate child that the fact of its illegitimacy should appear on the face of the adoption papers. It is sufficient that such fact be shown on the examination and all that is necessary for adoption under those circumstances was (1) the consent of the child; (2) the consent of the mother duly acknowledged and certified in the manner required for conveyance of real estate to entitle it to record; (3) the appearance of the person with whom the child was living before the county judge for the execution of the agreement to adopt and

for the examination of the person with whom the child lived and the child separately; (4) if satisfied that the moral and temporal interests of the child would be promoted by adoption, the making of the order by the county judge directing that said child should be treated thenceforth in all respects as the child of the person adopting her.

The objection that the necessary instruments were executed in the presence of a person other than a judge before whom the proceeding for the adoption were had is immaterial, where the judge certifies in the order of adoption that the adopted child and the adopting parents appeared before him and that the necessary consents and agreements had been executed as provided for by the statute. *Von Beck v. Thomsen*, 44 App. Div. 373, 60 Supp. 1094; aff'd, 167 N. Y. 601.

Sections 66, 67 and 68, Domestic Relations Law, prescribed the only means by which the relation of parent and child formed under that statute can be abrogated or destroyed. There is no authority under that statute which enables the next of kin of a deceased person to directly attack the adoption proceedings, and in a proceeding for a judicial settlement of administrator's accounts a Surrogate's Court cannot review an order of adoption made by a county judge which recites all the jurisdictional facts required by the Domestic Relations Law. *Matter of Ward*, 59 Misc. 328.

Semble, that where the surrogate, deciding that the foster parents of an adopted child are unfit persons to have its care and custody, abrogates the order of adoption and no appeal is taken from the order of abrogation, the county judge has no power subsequently to make an order adopting the child to the same foster parents as before. *Matter of Trimm*, 30 Misc. 493, 63 Supp. 952.

Semble, that an abrogation of an adoption theretofore made under the Domestic Relations Law (L. 1896, chap. 272), can only be effected by proceedings before the county judge or the surrogate and that the Supreme Court has no power in regard to abrogation.

Although the County Court and the Surrogate's Court have concurrent jurisdiction in such a matter, the power to abrogate an order of adoption rests solely with whichever court granted the order. *Matter of Trimm*, 30 Misc. 493, 63 Supp. 952.

It was held in *People v. Paschal*, 68 Hun, 344, 22 Supp. 881, that the power of the Supreme Court to control the custody of a child on habeas corpus was not taken away by the Laws of 1884,

which provided for application to the Surrogate's Court of the county for the cancellation of an agreement of adoption.

Parol evidence as to an agreement adopting a child is not rendered inadmissible by the execution of an indenture of adoption not referring to it. *Brantingham v. Huff*, 43 App. Div. 414, 60 Supp. 157.

Proceedings in County Court.

Petition for Voluntary Adoption of Minor over Twelve Years of Age.

MONROE COUNTY COURT.

IN THE MATTER OF THE VOLUNTARY ADOPTION
OF MARY SMITH, A MINOR OVER THE AGE
OF TWELVE YEARS, BY JAMES H. JONES.

The petition of James H. Jones of the City of Rochester, in the County of Monroe, and State of New York, respectfully shows to the court:

I. That the above-named Mary Smith is a minor over the age of twelve years, born on or about the 15th day of July, 1897; that your petitioner is desirous of adopting the said Mary Smith as his own lawful child, pursuant to the statute in such case made and provided, and that the consent of said Mary Smith to her adoption by your petitioner is annexed to this petition and made a part thereof.

II. That the said Mary Smith is the legitimate child of William Smith and Elizabeth Smith, his wife, who are now living together as husband and wife in the said City of Rochester, and the consent of said William Smith and Elizabeth Smith, his wife, to the adoption of their said daughter, Mary Smith, by your petitioner is annexed to this petition and made a part thereof.

III. That your petitioner is an adult of full age, lawfully married to Emma Jones, an adult of full age; that your petitioner and his said wife, Emma Jones, live together as husband and wife in the said City of Rochester, and that the said Emma Jones duly consents to the adoption of said minor, Mary Smith, by your petitioner, by an instrument annexed to this petition and made a part thereof.

Annexed hereto, and made a part hereof, is an agreement on the part of your petitioner, as foster parent, to adopt and treat the said minor, Mary Smith, as his own lawful child.

Wherefore, your petitioner prays for an order of this court, permitting him to adopt the said minor, Mary Smith, as his own lawful child, pursuant to the statute in such case made and provided, and directing that the said minor, Mary Smith, be regarded and treated in all respects as the lawful child of said James H. Jones.

Dated at the City of Rochester in the County of Monroe and State of New York, the day of October, 1909.

(Signed) JAMES H. JONES.

(Add verification taken by Monroe County Judge.)

(Same title.) Minor's Consent to Adoption.

I, Mary Smith, a minor over twelve years of age, daughter of William Smith and Elizabeth Smith, his wife, of the City of Rochester, in the County of Monroe and State of New York, do hereby consent to my adoption by James H. Jones, of the said City of Rochester, pursuant to the statute in such case made and provided, and I hereby agree to be subject to all the duties of that relation.

Dated at the City of Rochester in the County of Monroe and State of New York, the day of October, 1909.

(Signed) MARY SMITH.

(Add acknowledgment taken before Monroe County Judge.)

(Same title.) Consent of Minor's Parents to Her Adoption.

We, William Smith and Elizabeth Smith, his wife, of the City of Rochester, in the County of Monroe and State of New York, the parents of Mary Smith, a minor over the age of twelve years, born on or about the 15th day of July, 1897, do hereby consent that the said Mary Smith be adopted by James H. Jones, of the said City of Rochester, as his own lawful child, pursuant to the statute in such case made and provided, and that said Mary Smith be hereafter known as Mary Smith Jones and be treated in all respects as the lawful child of said James H. Jones, and be subject to all the duties of that relation, and, in consideration of the premises, we hereby release and relinquish all our rights to the custody and control of our said daughter, Mary Smith, as aforesaid, and all our title and interest in her.

Dated at the City of Rochester in the County of Monroe and State of New York, the day of October, 1909.

(Signed) WILLIAM SMITH,
ELIZABETH SMITH.

(Add acknowledgment taken before Monroe County Judge.)

(Same title.) Consent of Wife of Foster Parent.

I, Emma Jones, the lawful wife of James H. Jones of the City of Rochester, in the County of Monroe and State of New York, do hereby consent that Mary Smith, a minor over twelve years of age and the daughter of William Smith and Elizabeth Smith, his wife, of the said City of Rochester, be adopted by my said husband, James H. Jones, as his own lawful child pursuant to the statute in such case made and provided.

Dated at the City of Rochester in the County of Monroe and State of New York, the day of October, 1909.

(Signed) EMMA JONES.

(Add acknowledgment taken before Monroe County Judge.)

(Same title.) Foster Parents' Agreement.

STATE OF NEW YORK, }
COUNTY OF MONROE, } ss.:
City of Rochester, }

I, James H. Jones, of the City of Rochester, in the County of Monroe and State of New York, desiring to adopt Mary Smith, a minor over the age of twelve years and the daughter of William Smith and Eliza-

lath Smith, his wife, of the said City of Rochester, do hereby consent and agree to adopt the said minor, Mary Smith, as my own lawful child pursuant to the statute in such case made and provided, and that the said Mary Smith shall take the name of Mary Smith Jones and be known as Mary Smith Jones, and that hereafter she shall sustain toward me and I toward her the relation of parent and child, and have all the rights and be subject to all the duties of that relation, and I further consent and agree that the said minor, Mary Smith, shall be treated in all respects as my own lawful child.

In witness whereof, I have hereunto set my hand and seal, at the City of Rochester, in the County of Monroe and State of New York, this day of October, 1909.

JAMES H. JONES. [L. S.]

(Add acknowledgment taken before Monroe County Judge.)

(Same title.)

Final Order of Adoption.

(Caption.)

Upon reading and filing the annexed petition of James H. Jones, praying that he be permitted to adopt Mary Smith, a minor over twelve years of age, as his own lawful child, pursuant to the statute in such case made and provided; the consent of said minor to her adoption by said James H. Jones; the consent of her parents, William Smith and Elizabeth Smith, to such adoption; the consent thereto of Emma Jones, the wife of said James H. Jones; and the consent and agreement of said James H. Jones to adopt said minor and treat her in all respects as his own lawful child; all of which are dated and duly verified and acknowledged before me this day of October, 1909, the same being all the consents and agreements required by statute; and after due examination by this court of the said parties, appearing before it as prescribed by law, from which it appears to the satisfaction of this court that said Mary Smith is a minor over twelve years of age, born on the 15th day of July, 1897; that the said William Smith and Elizabeth Smith, the parents of said minor, are unable to properly maintain, support and provide for said minor and that said James H. Jones is able, competent and willing to support, educate and maintain said minor, Mary Smith, and is in the judgment of this court a fit and proper person to adopt said minor and the court being satisfied that the moral and temporal interests of said minor will be promoted by said adoption, it is

Ordered and decreed, That said James H. Jones be and he hereby is authorized and empowered to adopt said minor, Mary Smith, as his own child and that the said minor be hereafter treated by him in all respects as his own lawful child; that the said James H. Jones be and he hereby is deemed to have assumed all the responsibilities of a parent in respect to said minor; and that said minor be hereafter known by the name of Mary Smith Jones and that the said James H. Jones, on the one part, and the said minor, Mary Smith, on the other part, shall sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the liabilities and duties of that relation.

It is further ordered and directed, That this order and the said petition and consents be filed and recorded in the office of the County Clerk of Monroe County.

.....,
Monroe County Judge.

Proceedings in Surrogate's Court.

**Petition for Adoption of Infant Child by the Paternal Grandparents, Matter of
MacRae, 189 N. Y. 142.**

NEW YORK SURROGATE'S COURT.

IN THE MATTER OF THE ADOPTION OF
MADELEINE HOPE MAC RAE.

To the Surrogate's Court, New York County:

The petition of Charles MacRae and Mary Jane MacRae respectfully shows to the court:

I. That they are the grandparents of Madeleine Hope MacRae; that they reside at 874 St. Nicholas Avenue, in the City of New York, and that said Madeleine Hope MacRae resides with them.

That said Madeleine Hope MacRae was born on the 23d day of March, 1895, and is the legitimate daughter of Charles H. MacRae, who is a son of your petitioners.

That said Charles H. MacRae has no property or personal means and is employed by your petitioner, Charles MacRae, on a small salary, and resides with your said petitioners. That your petitioner, Charles MacRae, has ample means to give said minor good care, attendance and education, according to her station in life, and is willing so to do.

III. That the mother of said Madeleine Hope MacRae is dead.

Wherefore, your petitioners pray that they may be allowed to adopt said Madeleine Hope MacRae as their own lawful child, and as the child of each of them, and be allowed to treat her in all respects as their own lawful child.

CHARLES MACRAE.

Dated October 12, 1897.

(Verification.)

Consent to Adoption.

(Same title.)

The undersigned, Charles Hope MacRae, residing at No. 874 St. Nicholas Avenue, in the City of New York, surviving parent of Madeleine Hope MacRae, a legitimate child of said Charles H. MacRae and Madeleine MacRae, deceased, consents that Charles MacRae and Mary Jane MacRae adopt said child and treat her as their own lawful child.

In witness whereof, I have hereunto set my hand this 12th day of October, 1897.

CHARLES HOPE MACRAE.

(Acknowledged before Surrogate.)

Order Confirming Adoption.

(Same title.)

(Caption.)

Application having been made to me by petition of Charles MacRae and Mary Jane MacRae, dated October 12, 1897, to confirm the adoption by said Charles MacRae of Madeleine Hope MacRae, and Charles MacRae and Mary MacRae, the foster parents, and Charles H. MacRae, the surviving parent, being all the persons whose consent is necessary to the adoption of Madeleine Hope MacRae by Charles MacRae, having appeared before me on the 12th day of October, 1897, with Madeleine Hope MacRae, a minor, less than three years of age, and the said

Charles MacRae and Mary Jane MacRae and Charles H. MacRae, having presented to me an instrument in writing containing substantially the consents required and an agreement on the part of the foster parents to adopt and treat the minor as their own lawful child, and it appearing that all the said parties reside in the City and County of New York, and it appearing that the mother of said minor is dead; that the father of the said minor is a son of said Charles MacRae and resides with him and is employed by him on a small salary,

And being satisfied that the moral and temporal interests of the child will be promoted by such adoption, for the reason that said Charles MacRae can give her better care and education than said Charles H. MacRae, her father,

Now, therefore, it is ordered, That the adoption of Madeleine Hope MacRae by Charles MacRae and Mary Jane MacRae, as their own lawful child, and as the child of each of them, be and it hereby is allowed and confirmed, and that the said Madeleine Hope MacRae shall henceforth be regarded and treated in all respects as the child of said Charles MacRae and Mary Jane MacRae.

FRANK T. FITZGERALD.
Surrogate.

ARTICLE II.

ADOPTION FROM CHARITABLE INSTITUTIONS. §§ 115-118.

- § 115. (Formerly § 65) *Adoption from charitable institutions, 72.*
- § 117. (Formerly § 67) *Application in behalf of child for abrogation of an adoption from a charitable institution, 72.*
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§ 115. (Formerly § 65). Adoption from charitable institutions.

An orphan asylum or charitable institution incorporated for the care of orphan, friendless or destitute children may place children for adoption, and the adoption of every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child if over twelve years of age, all of whom shall appear before the county judge or surrogate of the county where such foster parents reside and be examined, except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of such filing and recording.

§ 117. (Formerly § 67). Application in behalf of child for abrogation of an adoption from a charitable institution.

A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on behalf of such child, may make an application to the county judge or the surrogate's court of the county in which

the foster parent then resides, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain, or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate, in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the Code of Civil Procedure relating to the issuing, contents, time and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogate's courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing of such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereon.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

§ 118. (Formerly § 68). Application by foster parent for the abrogation of such an adoption.

A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceedings, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

Adoption of Child Formerly in Custody of Foundling Asylum.

(Adapted from *Von Beck v. Thomsen*, 44 App. Div. 373.)

Petition.

To the Surrogate's Court of the County of New York:

The petition of Christian Thomsen and Florentine Thomsen, his wife, respectfully shows:

That your petitioners are residents of the City of New York, residing at No. 6 West 21st Street.

That your petitioners are desirous of adopting a certain minor female child under the laws of this State in such case made and provided, namely under the Domestic Relations Law, being chapter 14 of the Consolidated Laws.

That said child is now about four and a half years old, and has been in the family and under the care of your petitioners since the month of March, 1904, and that they have treated said child as their adopted daughter.

That the parents of said child are not known to them; that a society called the "Foundling Asylum of the Sisters of Charity, in the City of New York," which society was duly incorporated under the Laws of this State, on October 8, 1869, and whose charter was amended by a special act of the Legislature passed May 11, 1872, and whose particular business and object is to receive, care for, maintain and support deserted children or foundlings, heretofore received and maintained said infant child, and afterward, in the month of March, 1904, delivered and assigned said child, by them called "Lora," and now called "Sylvia," to your petitioners to adopt, maintain and educate the same, and to bring her up in the Roman Catholic religion, which your petitioners have done ever since.

That your petitioners are desirous of adopting said child under said act of the Legislature of this State, and said society, called the "Foundling Society of the Sisters of Charity in the City of New York," are willing to give, and have given, their consent that your petitioners may adopt said child.

Your petitioners therefore pray that the Surrogate of this court cause the proper persons to appear before him, and that upon due examination of the parties, the necessary consent be signed and the necessary agreement be executed by your petitioners and that the necessary order be made directing that the said child shall henceforth be regarded and treated in all respects, as their own lawful child should be treated, and that the honorable Surrogate make such other and further order as the said statute requires and as to him shall seem meet and proper, and

Your petitioners will ever pray.

New York, 30th of November, 1907.

CHRISTIAN THOMSEN,
FLORENTINE THOMSEN.

(Verification.)

Order to Appear and be Examined as to a Proposed Adoption.

SURROGATE'S COURT — NEW YORK COUNTY.

IN THE MATTER OF THE PETITION OF
CHRISTIAN THOMSEN AND FLORENTINE
THOMSEN, TO LEGALIZE THE ADOPTION BY
THEM OF A CERTAIN MINOR FEMALE CHILD,
ABANDONED BY HER PARENTS, CALLED
"SYLVIA," ALIAS "LORA."

Upon reading the petition of Christian Thomsen and Florentine Thomsen, his wife, dated November 30, 1907, it is

Ordered, That the petitioners aforesaid and the proper officer of the society called "Foundling Society of the Sisters of Charity in the City of New York," a corporation organized under the laws of the State of New York, and the minor child adopted by said petitioners, appear before me at chambers of the Surrogate's Court of New York County at the County Court House in the City of New York on the 23d day of December, 1907, at 5 o'clock of that day, to be examined according to the provisions of the Domestic Relations Law, that it may be determined whether the moral and temporal interests of said child will be promoted by such adoption, and to have the legal documents and papers required by law to be executed.

New York, December 11, 1907.

.....,
Surrogate.

(Same title.)

Foster Parents' Agreement.

Be it known that we, Christian Thomsen and Florentine Thomsen, his wife, of the City, County and State of New York, do hereby agree and covenant that we hereby do adopt a certain minor female child, abandoned by her parents, and heretofore, to wit, about the month of July, 1904, received and taken care of by the society, called "Foundling Asylum of the Sisters of Charity in the City of New York," a corporation duly organized under the laws of the State of New York, and by them called by the Christian name of "Lora," and by us called "Sylvia," which child was delivered to us by said society, to be adopted and maintained and educated by us, about the month of March, 1874; said child being now about five years old.

And we further agree and bind ourselves jointly and severally, firmly by these presents that the said child shall be adopted and treated by us and each of us, in all respects, as our own child should be treated, and be brought up in the Roman Catholic religion.

In witness whereof, we have hereunto set our hands and seal this 23d day of December, one thousand nine hundred and seven.

CHR. THOMSEN,
FLORENTINE THOMSEN.

Signed, sealed and delivered in the presence of

.....
Surrogate of New York County.

(Same acknowledgment as taken before Surrogate of New York County.)

(Same title.)

Foster Parents' Consent.

We, Christian Thomsen and Florentine, his wife, of the City and County of New York, do hereby consent to adopt the certain minor female child about five years old, heretofore received and taken care of by the society called "Foundling Asylum of the Sisters of Charity in the City of New York" and by them called "Lora" and now called "Sylvia" and delivered to us by said society to be adopted and maintained by us; and we consent and promise to bring up said child in the Roman Catholic religion and to treat her the same in all respects as our own lawful child should be treated.

New York, December 23, 1907.

CHR. THOMSEN,
FLORENTINE THOMSEN.

In presence of

.....
Surrogate of New York County.

(Same acknowledgment as taken by Surrogate of New York County.)

(Same title.)

Final Order of Adoption.

(Caption.)

Upon reading and filing the petition of Christian Thomsen and Florentine Thomsen, his wife, dated November 30, 1907, praying to have the adoption by them of a certain minor female child abandoned by its parents, legalized under the Domestic Relations Law.

And it appearing to my satisfaction that the said child is a minor of the age of about five years and was abandoned by its parents and that the parents are not known and that said infant child was received and taken under the care, charge and custody of the society called "The Foundling Asylum of the Sisters of Charity in the City of New York," a corporation created, organized and acting under and by virtue of the laws of this State, and its amended charter, and the said society, acting by its proper officer, Sister Irene (Catherine Fitzgibbon), and having heretofore had the lawful custody of said child, called by them "Lora," have given their consent to the adoption of said child by said Christian Thomsen and Florentine, his wife, and have heretofore transferred and assigned said child to the said Christian and Florentine Thomsen.

And the said persons adopting said child now called "Sylvia," and the child adopted, and the said society, the "Foundling Asylum of the Sisters of Charity in the City of New York," by their proper officer, Sister Irene (Catherine Fitzgibbon), having appeared before me, and the necessary consent having been signed, and an agreement having been duly executed by the said Christian Thomsen and Florentine Thomsen, the persons adopting said child, to the effect that the child shall be adopted and treated, in all respects, as their own lawful child should be treated.

And all the said persons appearing before me have been examined by me, separately.

And I, being satisfied that the moral and temporal interest of said child will be promoted by the adoption.

Now for and on the reasons aforesated, I.....
Surrogate of the County of New York, do hereby order, decree and direct that the said minor female child, called "Sylvia" and theretofore called "Lora," shall henceforth be regarded and treated in all respects

as the child of said Christian Thomsen and Florentine, his wife, and shall take the name of Sylvia Thomsen, and the two shall henceforth sustain toward each other the relation of parents and child, and shall have all the rights and be subject however to the exceptions in said act set forth.

.....
Surrogate of the County of New York.

ARTICLE III.

EFFECT OF ADOPTION. § 114.

§ 114. (Formerly § 64). Effect of adoption.

Thereafter the parents of the minor are relieved from all parental duties toward, and all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent, and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the minor sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

A contract of adoption made in 1844 between the parents and the adopters, the consideration being the bringing up of the child, giving her their name, making her their heir, and that if she should survive them to give property to her, made by oral agreement of adoption, and not made with reference to real estate, is not within the Statute of Frauds, where one of the parties has fully complied with all the requirements. *Godine v. Kidd*, 64 Hun, 585, 29 Abb. N. C. 36, 46 St. Rep. 813, 19 Supp. 335. 29 Abb. N. C. has note at page 46 on adoption under the statute.

Section 13, Laws of 1873, chapter 830, which provided that nothing herein contained shall prevent the proof of the adoption of any child heretofore made, according to any method practiced in this State, from being received in evidence, nor such adoption from having the effect of an adoption hereunder, refers only to those forms

of adoption theretofore existing by virtue of special statutory enactments contained in the charter of charitable societies that receive destitute and homeless children; and whose officers are permitted to execute agreements of adoption on their behalf with suitable persons willing to assume the obligations of parents. The court says it is obvious that the Legislature did not have in contemplation the legalizing of private agreements executed without authority of law, and containing no safeguards or restrictions of any kind as to the transmission of property. *Matter of Thorne*, 155 N. Y. 140.

Chapter 830 of the Laws of 1873, legalizing adoptions, only applies to such as took place after its passage.

Section 13 of said act provides "that nothing herein contained shall prevent proof of the adoption of any child heretofore made, according to any method practiced in this State from being received in evidence, *nor such adoption having the effect of an adoption hereunder.*"

Held, that though the second clause provides that the statute shall not have the effect of preventing an adoption, theretofore made, from having the same effect as one made thereunder, yet it does not provide that an adoption theretofore made shall have the like effect as one made thereunder. *Hill v. Nye*, 17 Hun, 457.

The consent of parents of a child to his adoption, when the adoption is not under any statute, does not deprive parents of the right to inherit as the child's next of kin. There is no method of adoption which will result in establishing a right of inheritance, except that prescribed by statute; and where a plaintiff claims as an adopted child, a complaint will not be allowed to be amended so as to set up a mere agreement to adopt. *Carroll v. Collins*, 6 App. Div. 106, 40 Supp. 54, 74 St. Rep. 667.

The provisions of section 13 of chapter 830, Laws of 1873, providing that nothing therein contained shall prevent the proof of the adoption of any child heretofore made, etc., applied only to prior adoptions which were authorized by special statute. *Carroll v. Collins*, 6 App. Div. 106, 40 Supp. 54, 74 St. Rep. 667. The adoption of a child according to any method practiced in this State made prior to that date was legalized by chapter 830 of the Laws of 1873. Children so adopted have a right under the act of 1887 to inherit both real and personal estate of the person adopting them as if they were legitimate children of such persons. *Simmons v. Burrell*, 8 Misc. 388, 59 St. Rep. 554, 28 Supp. 625.

It is held, in *Dodin v. Dodin*, 16 App. Div. 42, 44 Supp. 800,

aff'g 17 Misc. 35, 40 Supp. 748, that a child adopted in 1886 is, under the provisions of the statute of 1873, entitled to take property under the provisions of a will of its adopted father directing that the remainder of the estate shall "descend and be distributed according to the laws of the State of New York." Aff'd 162 N. Y. 635.

The legal status of an adopted child, acquired by the law of adoption, is by the law of comity recognized in every other jurisdiction where such status becomes material in determining the right to take property by will or inheritance, so that children of foreign adoption, whose rights are to be adjudicated upon here, should be regarded in the same light as though they had been duly adopted under the laws of New York. In case of adoption under the statute of this State the foster parent and the minor have all the rights of parent and child, including the right of inheritance from each other; but a limitation, in a deed or will, to a child or children or conditional upon the survivorship of a child or children, is not deemed to include an adopted child where the grantor or testator is a stranger to the adoption. *Matter of Leask*, 197 N. Y. 193, aff'g 130 App. Div. 898, 115 Supp. 1124.

Where husband adopts a child, with a provision that if she remains with him until she becomes eighteen years of age she shall be entitled to the interest of a child in his estate, the contract must be enforced in subordination to the rights of the widow in the husband's estate, which he cannot impair. Where a child was adopted under a contract to feed, clothe, educate and provide for it, if she should remain with the adopting parents and subject to their government until she arrived at eighteen years of age, when she should be entitled to her "dower right to the property" as if she were their own child, it was the intent of the parties that on the performance of the condition she should be entitled to the same interest in her foster father's property as his own lawful child would have had in case of intestacy. *Middleworth v. Ordway*, 49 Misc. 74, 98 Supp. 10, 18 Anno. Cas. 102, with note; aff'd, 117 App. Div. 913, 191 N. Y. 404.

Although an adoption of a child is effected under the laws of another State, the devolution of real property in this State to such child is to be determined by the law of this State. Such adopted child is not an "heir-at-law" of a sister of her foster mother, where the latter dies before such sister. *Kettell v. Baxter*, 50 Misc. 428, 100 Supp. 529.

When a foster parent on adopting two children from an orphan

asylum agreed that "provision shall be made by will . . . giving to such adopted child a reasonable share" of his estate, "such as would be given if he were the father of said child," he was not bound to divide his estate among them in the same proportion they would receive as heirs, but was bound only to give such reasonable share of the estate as a parent would give, and hence, where the estate was small and one of the children, a male, married and was self-supporting, while the other, a female, was of weak mind and unable to care for herself, a will giving \$1 to the adopted son and the remainder to the daughter was reasonable and within the contract. *Doppman v. Muller*, 137 App. Div. 82.

A child was adopted under Laws of 1873, chapter 830, which provided that the adopted child should not have the right of inheritance, but subsequently and prior to the death of the parent, the statute was amended by Laws of 1887, chapter 703, which conferred the right of inheritance upon the adopted child; *held*, that the adopted child was entitled to inherit from the parent, as the right of inheritance is determinable at the time of death of the intestate. *Theobald v. Smith*, 103 App. Div. 200, 92 Supp. 1019.

A husband cannot adopt a child without the consent of his wife and where she did not sign the instrument and it does not appear that she ever consented to such adoption, or any order of adoption was made by the court having such matters in charge, the child is not legally adopted; but is entitled, as against the husband and his estate, to the benefits secured to her by a contract made by him with the father of the child. *Middleworth v. Ordway*, 191 N. Y. 404, aff'g 117 App. Div. 913, 102 Supp. 1143.

Domestic Relations Laws (Laws 1896, p. 225, chap. 272), section 60, providing that nothing in regard to an adopted child inheriting from the foster-parent shall apply to any "will, devise or trust" created before a specified date, or interfere with such "will, devise or trust," and as to any such "will, devise or trust," a child adopted before that date is not an heir, so as to alter estates, or trusts, or devises in wills so created, does not prevent a child adopted in 1883 by a beneficiary for life in a deed executed prior to the date specified in the statute conveying land in trust for the beneficiary for life, with remainder to heirs, from taking the remainder as an heir of the beneficiary, for the words "will, devise or trust" in the statute are confined to a testamentary disposition, and even if the word "trust" be assumed to extend to a trust deed, the trust created by the deed was only for the benefit of the bene-

ficiary for life and terminated at her death. *Gilliam v. Guaranty Trust Co. of New York*, 186 N. Y. 127, aff'g 111 App. Div. 656, 97 Supp. 758.

In *Kemp v. New York Produce Exchange*, 34 App. Div. 175, 54 Supp. 678, the court considered the effect of a by-law of that body with reference to the right to inherit a sum payable on the death of one of its members, and it seems that an adopted child of such member might claim the fund as the next of kin under the Statute of Distributions, as modified by chapter 703 of the Laws of 1887, although not considered as the child of the deceased member within the meaning of the by-law, the by-law being intended to be construed under the statutes of the State as they existed at the member's death.

A child adopted by a husband and wife in 1875, after policies of insurance had been issued upon the husband's life, payable to the wife and in case of her failure to survive the husband, to her children for their use, is entitled upon the wife's failure to survive the husband, who died in 1898, to share in the proceeds of the policies with the natural children of the adopting parents who were living at the time the policies were issued. *Von Beck v. Thomsen*, 44 App. Div. 373, 60 Supp. 1094, 7 Anno. Cas. 33; aff'd, 167 N. Y. 601.

Where the mother, the sole surviving parent of the child, enters into a contract with a husband and wife by which she delivers and transfers her right in the child to them, and they in consideration thereof agree to adopt it, and upon their death to give to it all the property of which either of them may then be possessed, the child may maintain an action against the devisees and grantees of the husband to compel the specific performance of the contract. *Brantingham v. Huff*, 43 App. Div. 414, 60 Supp. 157.

A contract with a mother, by which A agrees to take the child of the former and maintain him as her own child, and at her death to give him her property, may be specifically enforced in equity by the child against the estate of A, though it is not enforceable at law. *Winne v. Winne*, 166 N. Y. 263, aff'g 48 App. Div. 638, 63 Supp. 1118.

Where a child adopted by one of the parties, against whom a writ of habeas corpus was issued at the instance of the child's uncle, appeared to have been intrusted by her to the other defendant, it was held that the order for the change of custody to the nearest relative was properly granted, notwithstanding the fact that such relative is one who previously consented to the adoption; it appearing that the

woman with whom the child lived was at that time living in adultery. *People ex rel. McKinney v. Stinson*, 13 App. Div. 111, 43 Supp. 311.

A petitioner for probate of a will who has knowledge of an adoption of a child by the testator should allege the fact in the petition; he has no right to pass upon the adoption papers and determine for himself that such child is not entitled to be cited, but the question is one for the determination of the court in a proper proceeding for that purpose. *Matter of Gregory*, 13 Misc. 363, 35 Supp. 105.

Where an alleged adopted daughter sought to compel a filing of an inventory, and the adoption was denied, it was held that the surrogate might properly investigate the question of adoption before making the order compelling the filing of the inventory. *Matter of Comins*, 9 App. Div. 492, 41 Supp. 323. A child legally adopted under the laws of another State, substantially similar to our own, is exempt from the collateral inheritance tax. No evidence of formal adoption is required. *Matter of Butler*, 34 St. Rep. 189, 12 Supp. 201.

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See FORECLOSURE BY ADVERTISEMENT.

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ARTICLE I.

SCOPE AND EFFECT OF THE PROVISIONS ON THIS SUBJECT. § 2386.

§ 2386. Application of this title.

This title does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise

expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

In *Elmendorf v. Harris*, 5 Wend. 516, arbitration is defined as "a submission by parties of matters in controversy to the judgment of two or more individuals who are substituted in place of a judicatory established by law, and who are to decide the controversy. It is called a domestic tribunal, and the arbitrators, judges of the parties, choosing." The act by which parties submit their grievances to the tribunal is called a "submission," the persons selected as judges are termed "arbitrators," and their decision is an "award."

Arbitration existed at common law and was early recognized by the statutes of this State. Under the Revised Statutes a complete system was introduced providing for the conduct of arbitrations and the enforcement of awards by the entry of judgment thereon, saving the necessity of an action on the bond. It was also provided that appeals might be taken from the award, and the manner of vacating, modifying, and correcting them was prescribed. The present codification has made but slight changes. The question as to how far the statutes have affected the common-law right to submit to arbitration is discussed. *Cutter v. Cutter*, 48 N. Y. Super. Ct. 470. The weight of authority seems to be in favor of the proposition that the common-law right exists to submit matters to arbitration by parol. That other arbitrations are controlled by the statute, at least in part, see *Wells v. Lain*, 15 Wend. 99; *Diedrick v. Richley*, 2 Hill, 271; *Cope v. Gilbert*, 4 Denio, 347; *Bloomer v. Sherman*, 5 Paige, 575; *Ross v. Luther*, 4 Cow. 159.

While chapter 17, title 8, of the Code of Civil Procedure does not affect common-law arbitrations, "except as otherwise especially prescribed" (§ 2386), this clause indicates that there are provisions therein that were intended to include and apply to such arbitrations. *Hinkle v. Zimmerman*, 184 N. Y. 114, aff'g 102 App. Div. 616, 92 Supp. 1128.

The jealousy with which, at one time, courts regarded the withdrawal of controversies from their jurisdiction by the agreement of parties, has yielded to a more sensible view, and arbitrations are now encouraged as an easy, expeditious, and inexpensive method of settling disputes, and as tending to prevent litigation. *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392, 399.

A submission of disputes to arbitrators governed by common-law principles and rules may be competently made, notwithstanding the provisions of the Code on that subject, and such submission is ir-

revocable after the matter has been finally submitted. *N. Y. L. & W. R. R. Co. v. Schneider*, 119 N. Y. 475. See, however, *Lorenzo v. Deery*, 26 Hun, 447; cited in *Van Beuren v. Wotherspoon*, 12 App. Div. 427.

Where, in an action in the United States Circuit Court, the plaintiff's complaint is dismissed on the ground that he has failed to establish a cause of action, and, on appeal by the plaintiff, the United States Circuit Court of Appeals dismisses the action, holding that the United States court had no jurisdiction to entertain it, the action and proceedings in the Federal court do not amount to a common-law arbitration or preclude the plaintiff thereafter from maintaining an action in a court having jurisdiction, but the case resembles one in which an arbitrator, duly chosen, has refused to act and pass upon the claims of the parties. *Dunlevie v. Spangenberg*, 66 Misc. 354.

Where the submission is by parol, the statute has no application. *Cope v. Gilbert*, 4 Denio, 349; *Valentine v. Valentine*, 2 Barb. Ch. 430. A parol agreement to submit matters which cannot be determined by a parol arbitration is void. *French v. New*, 2 Abb. Ct. App. 209; s. c., 28 N. Y. 147.

It seems that although the submission to arbitrate is in writing, if it be not acknowledged and proved or certified as required by section 2366 it is not a statutory arbitration and is not governed by the provisions of this title. *Van Beuren v. Wotherspoon*, 12 App. Div. 421. It seems that an arbitration which does not comply with the requirements of this title, and where the method of procedure is informal and the award which follows was never confirmed, and where no judgment was entered thereon, that the submission nevertheless is good at common law, and the award as between the parties possesses the same force and effect as a final judgment in regard to all matters within the scope of the submission. *Burhans v. Union Free School District*, 24 App. Div. 429, citing *Coleman v. Wade*, 6 N. Y. 44; *N. Y. L. & W. R. R. Co. v. Schneider*, 119 N. Y. 475.

There is a difference between common-law arbitrations and arbitrations under this title of the Code, and in common-law arbitrations certain requirements of the statutory arbitration do not apply—for instance the requirements of section 2372 in reference to the filing or delivery of the award. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. Rep. 30. If the arbitration is a common-law arbitration the court cannot set aside an award therein authorized otherwise than by action. In common-law arbitrations the provisions of the

Code (§ 2374) as to motions in respect to the award do not apply, and if any injustice has been suffered upon the part of the moving party, such injustice must be redressed by action. *In re Dicarlo*, 13 Supp. 83.

A court of equity will not compel specific performance of an agreement to arbitrate. *Sinclair v. Talmadge*, 35 Barb. 602; *Dunnell v. Keteltas*, 16 Abb. 205; s. c., aff'd, 26 How. 599; *Hurst v. Litchfield*, 39 N. Y. 377. And a statute making arbitration compulsory is held unconstitutional, as depriving a party of trial by jury. *People v. Haws*, 37 Barb. 440. In *President, etc., of the Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, the authorities upon the binding force of agreement to arbitrate are collated and discussed, and it is said that there are two classes of cases; in one class of cases the parties undertake, by an independent agreement, to provide for the settlement of all disputes by arbitration, to the exclusion of the courts; such an agreement is no bar to an action, the agreement only entitling the party to damages. In the other class of cases the agreement which creates the liability qualifies the right by providing that before the right of action accrues damages shall be determined, or amounts and values ascertained, and this is made a condition precedent; this condition is lawful and the courts will give full effect to it. It is further held that the rule that an agreement to arbitrate is not sufficient to oust a court at law, or equity, of jurisdiction is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter or spirit of the decisions already made. A large number of cases are cited and commented upon, and the conclusions arrived at are reached after thorough investigation.

A report of a referee in an irregular reference may be made available at common law as an award. *Barber v. Lane*, 60 App. Div. 87, 69 Supp. 739, rev'g judgment, 33 Misc. 60, 68 Supp. 147.

ARTICLE II.

WHAT CONTROVERSIES CAN BE SUBMITTED TO ARBITRATION, AND IN WHAT MANNER. §§ 2365-2367.

Subd. 1. Who may arbitrate and what subject-matter, 88.

§ 2365. *When submission to arbitration cannot be made*, 88.

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Subd. 1. Who may arbitrate and what subject-matter.
 §§ 2365, 2366.

§ 2365. When submission to arbitration cannot be made.

A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness.

2. Where the controversy arises respecting a claim to an estate in real property in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

§ 2366. What controversies may be submitted, and how.

Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit to the arbitration of one or more arbitrators, any controversy, existing between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award, made pursuant to the submission. If the Supreme Court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not the judgment may be entered in any county.

The general principle is that where there is power to contract with a liability to pay, there is power to arbitrate. This includes a married woman, a corporation, and a guardian on behalf of a ward. *Weed v. Ellis*, 3 Caines, 253; *Brady v. Mayor of Brooklyn*, 1 Barb. 584; *Palmer v. Davis*, 28 N. Y. 242. See *Jones v. Phoenix Bank*, 8 N. Y. 228.

An agent entering into a submission in his own name is personally bound by the award. *Smith v. Van Ostrand*, 5 Hill, 489. But the principal may ratify the act of his agent, and thus become bound by the award. *Lowenstein v. McIntosh*, 37 Barb. 251; *Smith v. Sweeney*, 35 N. Y. 291. Where a submission is made by an attorney, if the parties appear and proceed before the arbitrators, they cannot object that the submission was unauthorized. *Diedrick v. Richley*, 2 Hill, 271; *Hays v. Hays*, 23 Wend. 363. See *Tillon v. U. S. L. Ins. Co.*, 8 Daly, 84. But in *McPherson v. Cox*, 86 N. Y. 472, the rule was held, Danforth, J., writing the opinion, all concurring except Earl, J., not voting, that an attorney-at-law cannot bind

his client by a submission to arbitration, and that an agent would not have this power, unless especially authorized by his principal.

The submission of a controversy to arbitration is not an action, and is not within the scope of the authority of an attorney, and that authority must be shown in order to bind the client by the award made. *Stinerville & Co. v. White*, 25 Misc. 314.

A board of supervisors may submit a claim to arbitration. *People v. Supervisors*, 24 Hun, 413. And the assent of a corporation to arbitration may be assumed from circumstances, as that all the trustees attended before the arbitrators. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469; appeal dismissed, 19 N. Y. 584. Executors and administrators have the right to submit to arbitrators disputed claims or demands against the estate they represent; they come within the statute. *Russell v. Lane*, 1 Barb. 519; *Wood v. Tunnicliff*, 74 N. Y. 38. Partners who sign or assent are bound; those who do not sign are not bound. *McBride v. Hagan*, 1 Wend. 326; *Harrington v. Luginan*, 15 Barb. 524; *Harrington v. Higham*, 13 Barb. 660. The fact that a party is under arrest at time of submission is not such duress as to avoid his agreement to arbitrate. *Shepard v. Watrous*, 3 Caines, 166.

A city has no authority to enter into a stipulation with a landowner to submit to arbitrators the amount of assessment on his lands benefited by street grading, for under the charter the power of assessment lies in the city. *Smadbeck v. City of Mt. Vernon*, 124 App. Div. 515, 109 Supp. 70.

The statute is not intended to authorize the submission of matters arising after the agreement. *Matter of Vanderveer*, 4 Denio, 249. The provision forbidding the submissions of claims in fee or for life to real estate forbids only the submission of controversies relating to the legal title in lands; a claim to an equitable estate in lands may be submitted. *Olcott v. Wood*, 14 N. Y. 32, aff'd 15 Barb. 644. But a submission to arbitration of a claim to a freehold estate is absolutely void and incapable of ratification. *Wiles v. Peck*, 26 N. Y. 42. A question of boundary may be submitted, or a claim for a term of years. *Cox v. Jagger*, 2 Cow. 638; *Robertson v. McNeil*, 12 Wend. 578; *Sloat v. Woodward*, 5 Hun, 340; aff'd, 71 N. Y. 590. Disputes between partners relative to the partnership property or business may be submitted. *Backer v. Fobes*, 20 N. Y. 204. The question as to whether or not real estate belonging to a religious corporation shall be sold cannot be submitted to arbitration, and it is held by the same authority that the questions as to who are the

legally elected trustees of a corporation cannot be so submitted. *Wyatt v. Benson*, 23 Barb. 327. A cause of action to set aside a conveyance and establish a lien on the land cannot be submitted to arbitration; it involves an estate in fee. *Keep v. Keep*, 17 Hun, 152. A submission of the question as to how much should be paid for the use of land for a highway was held valid. *Mitchell v. Bush*, 7 Cow. 185. A submission to arbitration of a dispute as to the line between two lots of land may be made by parol. *Ryder v. Dodge*, 14 Week. Dig. 84.

An agreement by which the members of an association agree to confer judicial powers on a body of men as to all controversies which may arise is void, and the courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission of specific matters in controversy. *Austin v. Searing*, 16 N. Y. 112.

Under a provision in a lease that if the parties at the time fixed for its renewal do not agree upon the value of the premises, then it should be determined by two disinterested, competent, then owners of real estate in the immediate vicinity of the demised property, or real estate agents or brokers well versed in the value of such property in that vicinity, one of whom should be chosen by each of the parties to the lease, and if they are unable to agree they should choose a third person and a decision of the majority of the three should be final; but if no two of them agree the average of the values determined upon by the three should be accepted, and an appraisal is not the submission of a controversy to arbitration within the meaning of sections 2365, 2368, and 2369 of the Code of Civil Procedure — it is an appraisal made under the provisions of the contract for the purpose of fixing the amount that should be paid by the tenant and included in his contract. *Wurster v. Armfield*, 175 N. Y. 256, rev'g 67 App. Div. 158, 73 Supp. 609.

The right of plaintiff to recover the damages provided by his contract with defendants, if they cease to manufacture, as therein stipulated, is not such a dispute as is contemplated by the clause of the contract providing that any dispute between the parties shall be referred to and decided by arbitrators, and that no action shall be brought by either party except to enforce a decision of such arbitrators. *Grant v. Platt & Lambert*, 110 App. Div. 867, 97 Supp. 29; aff'd, 186 N. Y. 611.

Where by the same agreement which creates a liability and gives a right it is made a condition precedent to a right of action thereon,

either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon, in case of such disagreement and in the absence of fraud, there is no cause of action under the agreement, either at law or in equity, until the award is made as provided. *Pres't, etc., D. & H. C. Co. v. Pa. Coal Co.*, 50 N. Y. 250.

It is said in *Nat. Contracting Co. v. Hudson R. W. P. Co.*, 170 N. Y. 439, 442, that the distinction between executory agreements of arbitration which oust a court of jurisdiction, and therefore are rejected as a bar, and those which are sustained as the sole remedy between the parties, is carefully drawn and fully discussed in *Delaware & Hudson Canal Co. v. Pa. Coal Co.*, 50 N. Y. 250, citing *Seward v. City of Rochester*, 109 N. Y. 168.

An agreement, in the event of the parties to a contract for the performance of certain work and the furnishing of certain materials in the construction of the iron metal work for a building failing to agree upon the questions as to whether any work was added or omitted, under the terms of the contract, and the fair valuation of such work, if added or omitted, that such disputes should be left to the determination of a third person, whose decision should be final, is not a general arbitration agreement attempting to oust the courts of jurisdiction but an agreement within the rule authorizing the parties to agree that the decision of a third person shall be a condition precedent to a right of action. *Wyckoff v. Woarms*, 118 App. Div. 699, 103 Supp. 650.

Subd. 2. The Submission.

At common law the submission might be by parol. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Diedrick v. Richley*, 2 Hill, 271. But an executory agreement under seal cannot be discharged by a parol arbitration. *French v. New*, 28 N. Y. 147. It is not important what form the submission takes. It is sufficient if it clearly shows intent to arbitrate and abide by the award, but it should be so drawn that the arbitrators acquire jurisdiction. The powers conferred must be strictly followed. *Pratt v. Hackett*, 6 Johns. 14; *McBride v. Hagan*, 1 Wend. 326; *Butler v. Mayor, etc.*, 7 Hill, 329; *Howard v. Sexton*, 4 N. Y. 157. It may be by mutual bonds so drawn as to show the intention of the parties. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469; *Brady v. Mayor of Brooklyn*, 1 Barb. 584. It is not necessary that there should be an express agreement to abide by the award; the submission implies such an

agreement. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Efner v. Shaw*, 2 Wend. 567. It was held, in *French v. New*, 20 Barb. 486, that where a submission was made omitting to authorize judgment to be entered on the award, that it was not a submission under the statute; this case was reversed, 28 N. Y. 147; and *Howard v. Sexton*, 4 N. Y. 157, expressly holds a submission valid notwithstanding that it does not contain an agreement that a judgment of a court of record may be entered on the award. If the submission is under the statute, if the parties intend to authorize the arbitrators to award the cost and expenses of the arbitration, the submission should contain such authority in express terms. *Matter of Vanderveer*, 4 Denio, 249; *People v. Newell*, 13 Barb. 86; rev'd, 7 N. Y. 1. But if the subject of the award is a pending action they may determine as to the costs of that suit, and also may award as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 249. Where the submission is of all demands it includes all actions relating and demands which were in existence at the time of the submission. *Selleck v. Adams*, 15 Johns. 197; *Fiedler v. Cooper*, 19 Wend. 285; *Owen v. Boerum*, 23 Barb. 187; *Byers v. Van Deusen*, 5 Wend. 268; *Wheeler v. Van Houten*, 12 Johns. 311. Parol evidence is not admissible to show that any matter was not intended to be submitted. *De Long v. Stanton*, 9 Johns. 38; *Efner v. Shaw*, 2 Wend. 567. Where the submission was by two parties on one side and one on the other it was held it included not only the joint demands of the two, but their individual demands against the other party. *Fiedler v. Cooper*, 19 Wend. 285. See *Dater v. Wellington*, 1 Hill, 319. A submission specifying particular questions and adding "divers and other matters" is deemed equivalent to a general submission of all questions. *Munro v. Alaire*, 2 Caines, 320. Uncertainty as to what is submitted is cured by reference to an instrument attached to the submission and referred to in it. *Winship v. Jewett*, 1 Barb. Ch. 173. A clause submitting "all questions between the parties connected with said partnership" includes everything necessary to a settlement of its affairs, though there is also an enumeration of special matters. *Locke v. Filey*, 14 Hun, 139.

A submission to arbitration of an action pending between the parties to the submission, and of "all other actions or causes of action" and of "all other matters in controversy" is a general submission of all questions and controversies between the parties. Where a submission is full and general of all matters in question between the parties, and the intent appears to have everything de-

cided, if anything is, a decision of all matters submitted will be imperatively required to validate the award, and an award determining a part only is void. *Jones v. Welwood et al.*, 71 N. Y. 208.

Where a contract for the sale of electric power provided that any question as to the intent and meaning of the contract should be submitted to arbitration, a controversy as to the right of the purchaser to assign the contract, resting not only on the provisions of the contract, but on the acts of the seller as constituting a waiver of rights which the purchaser might otherwise have had, was not within the provision as to arbitration. *Hudson River Water Power Co. v. Glens Falls Gas & Electric Light Co.*, 90 App. Div. 513, 85 Supp. 577, rev'g 41 Misc. 254, 84 Supp. 62; aff'd, 178 N. Y. 611.

An agreement for submission to arbitration must be duly acknowledged or proved and certified as a deed to be recorded in order to justify an order of confirmation under Code, section 2373, and the certificate of a notary public of another State must be properly authenticated. *Matter of Concrete Steel & Tile Const. Co.*, 65 Misc. 210, 121 Supp. 237, 2 Civ. Pro. N. S. 6.

An agreement to arbitrate not meeting the formal demands of the statute, in that it is not duly acknowledged and certified, affords no basis for action by the court. *Smadbeck v. City of Mt. Vernon*, 124 App. Div. 515, 109 Supp. 70.

Since the Code there is no statute in force which empowers a majority of the arbitrators appointed by private persons to make a valid award unless the submission is in writing subscribed by the parties and duly acknowledged or proved and certified as a deed is required to be for record. *Lorenzo v. Deery*, 26 Hun, 447; cited with *Brown v. Lyddy*, 2 Hun, 451, in *Van Beuren v. Wotherspoon*, 12 App. Div. 426; the latter case holding that a submission in writing not so acknowledged was a common-law arbitration.

Where an agreement to arbitrate is not acknowledged or proved and certified the court has no power to order judgment on the award nor to vacate the award. *Electric Steel Elevator Co. v. Kam Malt-ing Co.*, 112 App. Div. 686, 98 Supp. 604.

Agreements to submit a pending controversy were, under the circumstances, held arbitrations in *Dodge v. Waterbury*, 8 Cow. 136; *Merritt v. Thompson*, 27 N. Y. 225.

Submission, Short Form (134 N. Y. 88).

WHEREAS, Patrick J. Flannery, of the City of Yonkers, County of Westchester, and State of New York, claims that Aslan Sahagian is indebted to him for work, labor, and services performed and materials

furnished to the amount and in the manner set forth in the annexed bill, marked "A"; and

WHEREAS, the said Aslan Sahagian disputes the validity of said claim and alleges that he has sustained damages in consequence of the negligence and unskillful manner in which the said work was performed.

Now, therefore, we, Patrick J. Flannery and Aslan Sahagian, aforesaid, do hereby mutually covenant and agree to and with each other that Evert K. Baldwin, James W. Prendergast, Frederick Durand, and John C. Campbell, Jr., (and in case they cannot agree then that a fifth man to be named by the said [insert names of arbitrators] in writing) shall arbitrate, award, adjudge, and determine of and concerning all manner of claims, damages, and controversies whatsoever arising out of said suit or now pending, existing or held by and between us, the said parties. And we do further mutually agree to and with each other that the award to be made by the arbitrators shall in all things by us and each of us, and by our respective heirs, executors, administrators, and assigns, be well and faithfully kept and observed, provided that said award be made in writing and signed by the said arbitrators, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the fourth day of January next ensuing the date hereof.

And it is further mutually agreed by and between the parties aforesaid that judgment in the Supreme Court of the State of New York shall be rendered upon the award to be made pursuant to this submission.

Witness our hands and seals this day of

(Add acknowledgement).

PATRICK J. FLANNERY,
ASLAN SAHAGIAN.

Agreement for Arbitration (191 N. Y. 437).

Agreement made the 3d day of April, 1905, between Luke A. Burke, doing business in the City, County and State of New York, party of the first part, and Henry Corn, of the same place, party of the second part, witnesseth:

WHEREAS, under date of May 8, 1903, the parties hereto entered into a certain contract whereby the party of the first part agreed, under the direction and to the satisfaction of Robert Maynicke, architect, to provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect for the mason work of the alterations to the building known as Nos. 110 and 112 Fifth avenue in the Borough of Manhattan, New York City; and

WHEREAS, controversies have arisen, and still exist, between the parties hereto as to what amount, if any, is due the party of the first part from the party of the second part on account of the work performed and materials furnished on said building, whether under said contract or otherwise, and also as to what amount, if any, is due to the party of the first part from the party of the second part with regard to the various claims made on behalf of the party of the first part against the party of the second part arising out of the said contract or in connection with the alterations on said building; and also as to what amount, if any, is due the party of the second part from the party

of the first part with regard to the various claims made on behalf of the party of the second part against the party of the first part, arising out of said contract or in connection with the said alterations; and

WHEREAS, the parties hereto have agreed to submit all their differences to Hon. D. Cady Herrick, as arbitrator;

Now, therefore, the parties hereto in consideration of the premises, and of \$1 by each to the other in hand paid, the receipt whereof is hereby acknowledged, do agree as follows:

First: That the parties hereto do hereby, pursuant to chapter 17, title 8 of the Code of Civil Procedure, submit all and all manner of actions, cause and causes of actions, suits, controversies, claims and demands whatsoever, now pending and existing by and between them, as afore-said, to the Hon. D. Cady Herrick, as arbitrator, to decide the same with all reasonable dispatch, his decision to be final.

Second: The parties hereto hereby mutually covenant and agree to and with each other, that the award to be made by the said abritrator shall in all things, by each of them and by the executors, administrators and assigns of each of them, be well and faithfully kept, observed and performed, and that judgment of the Supreme Court shall be entered upon the award which may be made pursuant to the above submission, said judgment to be entered in New York County; to the end that all matters in controversey in that behalf between them shall be finally concluded.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Add acknowledgments.)

HENRY CORN, [L. s.]
LUKE A. BURKE. [L. s.]

Agreement to Arbitrate (138 App. Div. 147).

This agreement made the 7th day of January, 1910, between Julius Marqusee, of the Borough of Manhattan, New York City, party of the first part, and Harry N. Gitt, of the City of Hanover, county of York, State of Pennsylvania, party of the second part, Witnesseth:

WHEREAS, certain differences, disputes and controversies have arisen and do now exist between the parties hereto in relation to divers subjects and controversies in dispute between them, and which might respectively be the subject of an action; and

WHEREAS, the parties hereto did, on the 16th day of October, 1908, enter into an arbitration agreement for a settlement of such disputes, and which arbitration agreement has not been enforced and is hereby waived;

Now, therefore, the parties hereto do hereby mutually covenant and agree to and with each other as follows:

First: To submit all and all manner of actions, cause and causes of action, suits, controversies, claim and demands whatsoever now pending, existing or held by and between the said parties to Aaron J. Bach and to Frank F. Peard, who shall arbitrate, award, order, judge and determine of and concerning the same, and who, in case they are unable to agree with reference to said matters, shall select or appoint a third person as an additional arbitrator at any time they see fit, either before or after hearings had in accordance with this agreement, and such selection or appointment shall be in writing and a copy thereof shall be delivered to each of the parties hereto.

Second: In case of the selection or appointment of such additional arbitrator it shall not be necessary to rehear so much of said arbitration as shall theretofore have been heard, except as to such parts thereof as such additional arbitrator may desire to have reheard by and before all of said arbitrators, and the parties hereto do hereby waive such rehearing and consent that as to so much of said arbitration, said additional arbitrator may base his arbitration, award, order, judgment and determination upon the minutes of such prior hearings.

Third: In the event of the selection or appointment of such third arbitrator, the award, order, judgment and determination of any two of said arbitrators shall be valid and binding and have full force and effect.

Fourth: The award of said arbitrators, or any two of them, shall be in writing and duly signed and acknowledged by said arbitrators, or any two of them, and filed in the office of the Clerk of the Supreme Court, New York County; and it is hereby expressly agreed that judgment for the amount of such award, and in favor of the successful party therein, may be rendered and entered upon such award in and by the Supreme Court, New York County, in the manner provided by the Code of Civil Procedure of the State of New York.

Fifth: Notice of motion to confirm such award and for the entry of such judgment, and all other notices that may be necessary or proper in and about said matters, shall be served upon the respective parties by leaving and serving the same at their respective offices on Water street, Borough of Manhattan, New York City.

Sixth: That the parties hereto do hereby agree that all the arbitrators, and each and all of them, are to be sworn to perform their duties herewith before a notary public of New York County.

Seventh: No action, suit or proceeding at law or in equity shall be brought or maintained by either of the parties hereto against the other until after the making and filing of said award, and the hearing and determination of a motion to confirm the same, and the making and filing of said award and the hearing and determination of such motion shall be a condition precedent to the bringing and maintenance of any such actions, suits or proceedings at law or in equity.

Eighth: The award is to be made within a period of three months from the date of the first hearing and unless the award is so made, the parties hereto may or shall, if they see fit, discontinue all proceedings under this agreement and disregard the same.

Ninth: It is further agreed that any expenses incurred by reason of the arbitration agreed upon shall be borne between the parties hereto, share and share alike. All testimony to be taken in shorthand and transcribed and copy attached to decision.

In witness whereof, the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

(Add acknowledgments.)

JULIUS MARQUESE,
H. N. GITT.

[L. S.]
[L. S.]

Subd. 3. The Arbitrators. § 2367.

§ 2367. Appointment of additional arbitrator, or umpire.

Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed, unless the submission expressly so provides. Where a submission made either as prescribed in this title or

otherwise, provides that two or more arbitrators, therein designated, may select or appoint a person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties, or their attorneys.

The parties may select whomsoever they choose as arbitrators, although if a person be selected who is objectionable for any cause, the court will relieve the party in case he acts promptly so soon as he becomes aware of the incompetency. *Mayor, etc. v. Butler*, 1 Barb. 336; *Perry v. Moore*, 1 E. D. Smith, 32.

The appointment should be in writing if the submission is under the statute. *Elmendorf v. Harris*, 23 Wend. 628. But in a common-law arbitration an umpire may be appointed by parol. *Elmendorf v. Harris*, 5 Wend. 516.

The umpire may be appointed immediately by the arbitrators without waiting until the disagreement has arisen between them. *Butler v. Mayor*, 1 Hill, 489; *Mayor v. Butler*, 1 Barb. 325; *Van Cortlandt v. Underhill*, 17 Johns. 405; *McKinstry v. Solomons*, 2 Johns. 56, 13 Johns. 26.

In case the additional person acts with the arbitrators to hear and determine the matters in controversy (as is now provided by statute, *supra*), the proceedings are henceforth to be conducted the same in all respects as if he had been appointed in the first instance with the other arbitrators. *Lyon v. Blossom*, 4 Duer, 318. The failure of the umpire to take the oath does not render the award void, but it may be waived. In case there is no waiver the Supreme Court may set aside the award on application, and an action on the award setting up the irregularity is in the nature of an application to the equitable power of the court and is sufficient to present the question. Where, by the terms of a submission, two arbitrators are appointed with authority, in case of disagreement, to appoint a third, the decision of any two of them to be final in case of such disagreement and appointment, a rehearing is necessary, and unless this right is expressly and unequivocally waived a decision and award, without a rehearing upon notice to the losing party at the time appointed therefor, is not binding and cannot be enforced. *Day v. Hammond*, 57 N. Y. 479, and cases cited under section 2366. In *Matter of Martin*, 1 How. Pr. N. S. 28, it is held that an agreement in writing between the parties waiving the oath of arbitrators and of the umpire is to be construed with the submission, and to supply the omis-

sion from the submission of any provision for the appointment of an umpire; and the rule in *Brown v. Lyddy*, 11 Hun, 451, that a waiver of the right to adduce evidence before the arbitrators is not a waiver of the right to do so before the umpire, if the appointment of an umpire be thought necessary, is applied. The umpire, when called upon to act, is in general invested with the same power as the arbitrators and bound by the same rules and has to perform the same duties.

Under an arbitration agreement which provided that in case two arbitrators differed they should choose an umpire "whose decision under oath shall fix and determine the same" (namely, the value of certain lots for the purpose therein designated) it was held that when the arbitrators failed to agree the only duty left for them to perform was to appoint an umpire in the performance of whose duties under the agreement they were not required to be present or act; and where one of the parties insisted that an umpire should be chosen and the arbitration proceed and the other party would not consent thereto in the absence of his arbitrator, nor appoint a new arbitrator, it was held that a suitable person should be appointed by the court to act in the matter. *Van Beuren v. Witherspoon*, 12 App. Div. 421.

The requirements of section 2367 that the additional arbitrator must sit with the original arbitrators, and that if testimony has been taken before his selection, the matter must be reheard unless such hearing is waived, applies only to arbitrators under the statute and not to common-law arbitrators. Thus where the agreement was that a matter should be submitted to arbitrators "together with a third person to be appointed by them if necessary," and where the third person was selected by the arbitrators under the assumption that he should not act unless they should disagree, and the additional arbitrator in no way took part in the arbitration, it was held that he was only an umpire and that the arbitrators were not deprived of authority to act without him. *Enright v. Montauk Fire Ins. Co.*, 15 Supp. 894, 40 St. Rep. 642. If an agreement for arbitration authorizes the selection of an umpire upon a contingency, but the method by which he is to be chosen is not prescribed, the statute should be followed which requires the appointment to be in writing, and the umpire must sit with the original arbitrators upon the hearing, and if testimony has been taken before his appointment the matter must be reheard unless the rehearing is waived. As to the time when the umpire must be appointed, there is no statutory provision and no

general rule can be laid down, for the agreement usually controls the question. The submission provided that if the arbitrators failed to make an award before a certain day the matter should be submitted before the umpire then or thereafter to be appointed. After taking testimony the arbitrators chose an umpire, but it did not appear that the umpire sat with the arbitrators or heard the testimony; *held*, that the award without hearing the case anew was invalid. If two arbitrators, unable to agree, exercise a power under the agreement to appoint a third, the authority to make an award is vested in them jointly, but even if an award made by the two is valid (see section 2371) it must appear to have been the result of the joint deliberation of all. He has the same powers as the arbitrators and is bound by the same rules and is required to perform the same duties. *Matter of Grening*, 74 Hun, 62, 26 Supp. 117, 56 St. Rep. 196. See this case for a discussion of the rules governing the appointment of an umpire.

Subd. 4. Effect of Agreement to Arbitrate.

A submission to arbitration of a pending action and of "all other actions," and of "all other matters in controversy," is a general submission of all questions. *Jones v. Wellwood*, 71 N. Y. 208.

The submission to arbitration by parties of all matters in dispute growing out of a particular transaction or contract will estop them from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters. *N. Y. L. & W. W. Co. v. Schneider*, 119 N. Y. 475.

The effect of a submission to arbitration of a pending suit is so fully set forth in the following decision that an extract and citations are given as showing the rule in that respect. It is said, in *McNulty v. Solly*, 95 N. Y. 244: "The rule is well settled that mere submission to arbitration is a discontinuance of the suit. (*Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 399; *Smith v. Barse*, 2 Hill, 387; *Bank of Monroe v. Widner*, 11 Paige, 529, 533; *Ressequie v. Brownson*, 4 Barb. 541; *Wilson v. Williams*, 66 id. 209; *People v. Onondaga Common Pleas*, 1 Wend. 314.) In *Larkin v. Robbins*, 2 Wend. 505, it was held that this was so, although the arbitrators had not taken or consented to take upon themselves the burden of the submission, or done any act under it. It is sufficient, says Marcy, J., 'that the parties have selected these arbitrators, and concluded their agreement to submit to them. It

is this agreement which withdraws the cause from the court and effects a discontinuance of the suit.' The submission is *eo acto*, a discontinuance (*Ressequie v. Brownson, supra*): and such would be its effect although it had been immediately revoked. (*Smith v. Barse, supra*.) The ground upon which the doctrine rests is that the parties have selected another tribunal — one of their own creation — to settle the controversy, and they thereby agree to and do withdraw the cause from the court. In *Buel v. Dewey*, 22 How. Pr. 342, the rule is said to apply, although the arbitrators fail or refuse to take upon themselves the duty of the submission. There is no injustice in this rule. It was in the power of the parties either to ascertain beforehand whether the persons named would accept the office of arbitrators, or to so qualify their agreement as to make it conditional on their acceptance, or that proceedings in the suit should only be stayed until an award is made, or no longer than a specified time, and then cease to be of effect unless an award was made. But neither of these things was done, and we think the general law was properly applied by the court below, and that the defendant was entitled to the relief sought by motion. (*Wells v. Lain*, 15 Wend. 99; *Coleman v. Wade*, 6 N. Y. 44.) Cases are cited by the learned counsel for the appellant from the courts of other States (*Elliott v. Quimby*, 13 N. H. 183; *Chapman v. Seccomb*, 36 Me. 103), to the effect that the assent of the arbitrators is a condition precedent to the taking effect of the agreement for submission. But in this State the rule to the contrary seems to be too firmly established to be disturbed; and when the submission, as in this case, is the voluntary act of the parties, in words chosen by themselves, the court is not at liberty to add anything which requires their consent, or to look beyond the paper to discover their intent. The legal effect of the contract, as we have seen, was to discontinue the action and put it out of court, and to that the parties must be deemed to have assented. This result follows, although the submission was not acknowledged or certified, as prescribed by section 2366 of the Code. Its validity does not depend upon the provisions of the statute, but upon the common law, and section 2386 expressly provides that, except in certain cases, of which this is not one, the title of the Code concerning arbitrations does not affect a submission made otherwise than as prescribed therein, or any proceedings taken pursuant thereto." To the same effect is *Larkin v. Robbins*, 2 Wend. 505; *Wells v.*



Lain, 15 Wend. 99; *Grosvenor v. Hunt*, 11 How. Pr. 355; *Baldwin v. Barrett*, 4 Hun, 119; *Van Slyke v. Lettice*, 6 Hill, 610; *Blount v. Whitney*, 3 Sandf. 4. This is true even though the award is void. *Jordan v. Hyatt*, 3 Barb. 275; *Keep v. Keep*, 17 Hun, 152. Where there was provision for a stay, that was operative till an award was made which acted as a discontinuance. *Jacoby v. Johnston*, 1 Hun, 242.

Where a contractor furnishing material and doing work upon buildings agrees to submit matters in dispute with the owner to an arbitration, such submission and arbitration is a waiver by the contractor of his right to file a mechanic's lien for money due under the contract. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 30; aff'd, 119 N. Y. 475.

An agreement to arbitrate not carried out does not bar a suit on the cause intended to be submitted. *Haggard v. Morgan*, 4 Sandf. 198; aff'd, 6 N. Y. 422; *Buel v. Dewey*, 22 How. 342.

A submission of a dispute arising on a building contract, though not conforming to the mode prescribed by the contract, is sufficient to bind the parties by the award. The appearance by one of the parties as a witness is sufficient to show he assented to the submission. *White v. Mathews*, 14 Week. Dig. 67.

An agreement for an arbitration under the statute is to be given effect in a most liberal sense as accomplishing a complete and final settlement of all existing controversies between the parties thereto. The award thereunder is unassailable upon the ground that errors of law or of fact were committed. *Matter of Burke*, 191 N. Y. 437, aff'g 117 App. Div. 477, 102 Supp. 785.

A submission to arbitration of the claim of a contractor for expert work in the alteration of a building, *held*, to include the right of interest on the amount found due the contractor, and that his award in respect thereto was conclusive. *Matter of Burke*, 191 N. Y. 437, aff'g 117 App. Div. 477, 102 Supp. 785.

A liberal construction will be given to the submission and award of arbitrators, so as to uphold the award when not attacked for corruption or misconduct of the arbitrators. *Curtis v. Gokey*, 68 N. Y. 300.

Actions in equity to set aside an award, and if that be done to recover the amount of the loss, are not infrequent and have been quite uniformly sustained. *Mayor v. Phœnix Assurance Co., Ltd.*, 124 App. Div. 241.

ARTICLE III.

POWERS AND DUTIES OF ARBITRATORS.

Subd. 1. Notice of hearing, 102.

§ 2368. *Time for hearing; adjournment, etc, 102.*

Subd. 2. The oath, 104.

§ 2369. *Arbitrators to be sworn, 104.*

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§ 2371. *All the arbitrators to meet; when majority may award. Fees, 106.*

Subd. 4. General powers, 107.

§ 2370. *Attendance of witnesses, etc, 107.*

Subd. 1. Notice of Hearing. § 2368.

§ 2368. *Time for hearing; adjournment, etc.*

Subject to the terms of the submission, if any are specified therein the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

The arbitrators may fix the time and place of hearing, but the parties must have an opportunity to be heard, unless the stipulation provides to the contrary. *Morewood v. Jewett*, 2 Robt. 496. An award made without notice to a party of the hearing is void. *Jordan v. Hyatt*, 3 Barb. 275; *Moran v. Bogert*, 3 Hun, 603; *Knowlton v. Mickles*, 29 Barb. 465; *Peters v. Newkirk*, 6 Cow. 103. The party seeking to impeach the award must show lack of notice. *Mayor v. Butler*, 1 Barb. 325. Under the Revised Statutes the provisions regulating the mode of procedure were held to apply not only where the written submission contained an agreement that judgment might be entered, but generally to all written submissions. *Bulson v. Lohnes*, 29 N. Y. 291. But reference must be had to section 2386 in this connection, which has since been enacted; a similar enactment, however, existed in the statute. The notice of hearing and the production of evidence may be waived by the parties, and this waiver may be gathered from the circumstances of the case. It is no objection to the award of an arbitrator that he did not hear the parties or take their evidence when it appears that they waived a hearing, and that it was intended the arbitrator should decide the matter submitted upon his personal knowledge and inspection. *Wilberly v. Matthews*, 11 Week. Dig. 471; aff'd, 91 N. Y. 648. It is a good defense to an action upon an award to show that the arbitrators proceeded without notice to the defendant, and that they made the award in suit before defendant closed his proofs. *Garvey*

v. *Carey*, 35 How. 28. The arbitrators must take the usual means to ascertain values, and the parties are entitled to be heard and produce witnesses unless the privilege is waived. They are entitled to notice of appointment of an umpire, and an opportunity to be heard by him, and a waiver of this privilege as to the original two does not extend to the umpire. *Brown v. Lyddy*, 11 Hun, 451. And a submission which provides that the party found indebted should pay by a certain day implies a limitation that the award must be made by that day, and subsequent proceedings are void unless the time is extended in writing. *People v. Townsend*, 5 How. 315. But the time for making an award under a sealed submission at common law may be extended by parol, and if the parties proceed without objection, after time has expired, they will be deemed to have waived the stipulation as to time. *Wood v. Tunnichliff*, 74 N. Y. 38.

Where an arbitrator determines the questions submitted to him without hearing a party or appointing a time for a hearing, the decision is not binding on the party, and he may prove his claim anew. *Moran v. Bogart*, 16 Abb. N. S. 303.

Under a provision in a building contract, that should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by an arbitrator named, and his decision shall be final and conclusive, notice of submission to the arbitrator by one party need not be given to the other when no dispute as to items or values is to be determined, but merely the construction of the specifications. *Gustaveson v. McGay*, 12 Daly, 423, citing *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463. But where, after submission to arbitrators, they disagree and an umpire is chosen, the parties are entitled to notice and opportunity to be heard before the umpire and his associates, and an award made without notice is invalid. *Linde v. Republic Fire Ins. Co.*, 50 N. Y. Super. 362.

Precedent for Appointment of Time and Place of Hearing and Notice to Parties.

IN THE MATTER OF THE ARBITRATION BE-	}
TWEEN LUKE A. BURKE AND HENRY	
CORN, UNDER AN AGREEMENT TO ARBITRATE.	

To Luke A. Burke and Henry Corn:

You are hereby notified that the undersigned arbitrator appointed in and by an agreement of arbitration between you, dated the _____ day of _____, hereby appoints the _____ day of _____

, at ten o'clock in the forenoon, as the time, and the office of the said arbitrator at No. _____ street in the Borough of Manhattan, City of New York, as the place for the hearing of the matters submitted to him by said agreement of arbitration, and that he will attend at such time and place for the purpose of such hearing.

Yours, etc.,

Dated,

D. CADY HERRICK,
Arbitrator.

(Same title.) **Precedent for Notice of Hearing.**

Sir:

Take notice that the above-entitled matter will be brought to a hearing before Hon. D. Cady Herrick, the arbitrator appointed therein, at the office of said arbitrator at No. _____ street in the Borough of Manhattan, City of New York on the _____ day of _____, at ten o'clock in the forenoon pursuant to an order made by him, fixing such time and place for said hearing.

To HENRY CORN.

LUKE A. BURKE.

Subd. 2. The Oath. § 2369.

§ 2369. Arbitrators to be sworn.

Before hearing any testimony, arbitrators selected either as prescribed in this title, or otherwise, must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission or their attorneys.

A failure to take oath of office, give notice of meetings, and to avail themselves of testimony of witnesses sworn is a non-compliance with the provisions of sections 2365, 2368, 2369. *Wurster v. Armfield*, 175 N. Y. 256, rev'g 67 App. Div. 158, 73 Supp. 609.

The provisions of Code of Civil Procedure, section 2369, that arbitrators "selected either as prescribed in this title *or otherwise* must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived by the written consent of the parties to the submission or their attorneys," applies to arbitrators selected under a common-law arbitration as well as to those selected under the provisions of the statute. In such case the same rule to determine whether or not there was a waiver of the oath applies to common-law arbitrations as well as to those provided by statute, and unless there is a written consent of the parties or their attorneys it is not established. *Hinkle v. Zimmerman*, 184 N. Y. 114, aff'g 102 App. Div. 616, 92 Supp. 1128.

Arbitrators before taking testimony must make the required oath, unless the same is waived by the written consent of the parties. *Matter of Grening*, 74 Hun, 65, 26 Supp. 117, 56 St. Rep. 198.

The award of arbitrators is invalid unless they take the oath prescribed by this section before hearing testimony, and it seems that to establish a waiver of such oath, the written consent of the parties or their attorneys is required. *Flannery v. Sahagian*, 134 N. Y. 89. Although it was held formerly that the omission to take the oath did not invalidate the proceedings, whether under the statute or at common law. *Browning v. Wheeler*, 24 Wend. 258; *Howard v. Sexton*, 4 N. Y. 157; *Winship v. Jewett*, 1 Barb. Ch. 173. But it is an irregularity, and if not waived may be taken advantage of to set aside the award. *Day v. Hammond*, 57 N. Y. 479. It is a waiver if both parties are present and proceed to trial without a request to have the arbitrators sworn. *Kelsey v. Darrow*, 22 Hun, 125; *Cutler v. Cutler*, 48 N. Y. Super. 470.

Arbitrators, acting under a common-law submission to arbitration, need not be sworn. *Britton v. Hooper*, 25 Misc. 388, 55 Supp. 493.

The words "or otherwise," section 2369 of the Code of Civil Procedure, indicate a legislative intent to extend the requirement, that an arbitrator should be sworn, not only to those selected under the provisions of the title, but as well to those selected under a common-law arbitration. This being so, it follows that they must be sworn unless the oath is waived by the written consent of the parties to the submission or their attorneys. *Hinkle v. Zimmerman*, 184 N. Y. 114, aff'g 101 App. Div. 616, 92 Supp. 1128, and citing *Flannery v. Sahagian*, 134 N. Y. 85, 90.

Where an arbitrator omitted to take his oath at the opening of the hearing, but did so later, and one party discussed in his presence the amount of his compensation, the right to object was lost by a failure to do so till the matter was practically submitted for determination. *Atterbury v. Trustees of Columbia College*, 66 Misc. 273, 123 Supp. 25.

The authority of *Cutter v. Cutter*, 16 J. & S. 470, 98 N. Y. 628, upon the question whether the statutory provisions can be waived by proceeding with the submission, has been so far weakened by later expressions of the Court of Appeals (*Hinkle v. Zimmerman*, 184 N. Y. 114), that it cannot be taken to apply to these provisions at the present time. *Matter of Concrete Steel & Tile Con. Co.*, 65 Misc. 210 (211).

(Same title.)

Form of Oath.

STATE OF NEW YORK,	} ss.:
CITY AND COUNTY OF NEW YORK,	

I, D. Cady Herrick, the arbitrator named in the agreement of arbitration between the above-named parties, dated April 3, 1905, do hereby

swear that I will faithfully and fairly hear and examine the matters in controversy submitted to me, as arbitrator, by and between Luke A. Burke, on the one part, and Henry Corn, of the other part, and a just award thereon make according to the best of my understanding.

(Signature and Jurat.)

Subd. 3. Arbitrators Must Meet and Act. § 2371.

§ 2371. All the arbitrators to meet; when majority may award. Fees.

All the arbitrators, selected as prescribed in this title, must meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the Supreme Court; and also their expenses.

Under the Revised Statutes it was held two had power to hear and act in case all three were notified, and one refused to act. *Crofoot v. Allen*, 2 Wend. 494. But see language of the section where all heard the proofs, as to who may decide. *Shultz v. Halsey*, 3 Sandf. 405. And it might be shown *aliunde* the record that all heard the proofs. *Oakley v. Finch*, 7 Cow. 290. It is not necessary all should concur in the decision of every question which arises. *Campbell v. Western*, 3 Paige, 124. If one of the parties to an arbitration refuses to appoint an arbitrator the arbitrator appointed by the other party cannot act. *Holliday v. Marshall*, 7 Johns. 211. A submission provided that the decision of a "majority" should be binding, and the bond provided for decision "by said arbitrators;" *held*, an award by two was valid. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469. On a submission to two who were to choose a third, if they could not agree, which they did, an award signed by two only is valid. *Batley v. Button*, 13 Johns. 186. On this general subject, see *Matter of Grening*, 74 Hun, 63, 26 Supp. 117, 56 St. Rep. 198. An award signed by three, as to only two of whom there was a subscribing witness, *held*, good. *Ott v. Schroepfel*, 4 Barb. 250. See *Jackson v. Merritt*, 11 Abb. 370; *Schulz v. Halsey*, 3 Sandf. 405; *Haff v. Blossom*, 5 Bosw. 559; *Whitlock v. Duffield*, Hoff. Ch. 110, for decisions based on peculiar facts in each case. An award is in the nature of a judicial act, and void if made on Sunday. *Story v. Elliott*, 8 Cow. 27.

"Unless the statute, or the submission under which the arbitrators act and derive their authority, provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule

is general and imperative that all the arbitrators must unite in the award in order to render it valid." *Morgan v. Merchants' Insurance Assn.*, 52 App. Div. 61 (65).

Subd. 4. General Powers. § 2370.

§ 2370. Attendance of witnesses, etc.

The arbitrators, selected either as prescribed in this title, or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

The power of arbitrators is limited strictly to the matters submitted to them for determination, and an award on a matter not referred to them is void. *Cullen v. Shipway*, 78 App. Div. 130, 79 Supp. 627; aff'd, 177 N. Y. 571.

They cannot decide upon their own jurisdiction, nor take upon themselves authority by deciding that they have it, but must, in fact, have it under the agreement of the parties whose differences are submitted to them before their award can have any validity, and the fact of jurisdiction, when their decision is challenged, is always open to inquiry. *Dodds v. Hakes*, 114 N. Y. 260 (264).

The construction by arbitrators of the submission to them is not conclusive; it is for the court to determine whether they have exceeded their powers or refused to exercise them. The general rule that their decisions are not reviewable on the mere ground that they are erroneous applies only to their decisions on matters submitted to them. A submission by the parties thereto to arbitrators in the usual form contained this clause: "The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man." *Held*, that this did not justify a decision of the arbitrators that the submission limited them to passing upon the statements of the parties only. *Halstead v. Seaman*, 82 N. Y. 27.

The Supreme Court has no general supervisory power over awards of arbitrators; and where the arbitrators keep within their jurisdiction, their awards, in the absence of corruption or misconduct, will not be set aside for errors of judgment either as to the law or the facts. They may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures or for an error of law appearing on the face of the award, *i. e.*, where it appears that the arbitrators intended to decide according to law, but through mistake as to the law did not. It is not necessary that it should so appear by express statement; it is sufficient if it be shown

by clear and necessary inference. But the party alleging error, in order to sustain his action, must be able to show from the award itself that but for the mistake the award would have been different. Unless restricted by the submission, arbitrators may disregard strict rules of law and evidence and decide according to their sense of equity. *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392.

On dismissal of an action to enjoin two arbitrators chosen by a landlord and tenant, pursuant to a covenant in a lease to renew the same at a rent to be fixed by the arbitrators, from appointing an umpire as provided in the lease, it was held that it is not the province of a court of equity to direct arbitrators how they shall decide a case pending before them. *Livingston v. Sage*, 95 N. Y. 289.

If an arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption, or other misconduct, his award is unassailable. *Masury v. Whiton*, 111 N. Y. 679; *Hoffman v. DeGraaf*, 109 N. Y. 638; *McGregor v. Sprott*, 13 Supp. 191; *Matter of Wilkins*, 169 N. Y. 494. The award will not be set aside, because the arbitrators were mistaken in the law they applied to the facts, or decided the case on an erroneous theory. *Goodard v. King*, 40 Minn. 164. Nor for errors of judgment however great. *Turnbull v. Martin*, 37 How. 20; *Smith v. Cutler*, 10 Wend. 590; *Ketcham v. Woodruff*, 24 Barb. 147; *Cranston v. Kenny*, 9 Johns. 212; *Morris v. Ross*, 2 Hen. & M. 408; *Beach, Mod. Eq. Juris.*, section 60, p. 60. And a liberal interpretation is given to uphold an award when it is not attacked for corruption or misconduct of the arbitrators. *Phillips v. Rouss*, 7 N. Y. St. Rep. 378; *Curtis v. Gorkey*, 68 N. Y. 300.

ARTICLE IV.

THE AWARD AND ITS EFFECT.

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§ 2372. *Award; to be authenticated, etc.*, 108.

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Subd. 5. Effect of award, 115.

Subd. 1. Execution and Contents of Award. § 2372.

§ 2372. *Award; to be authenticated, etc.—*

To entitle the award to be enforced, as prescribed in this title, it must be in writing and, within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified in like manner, as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

As soon as arbitrators under the Code have delivered their award, they have no power to alter the same, although the first award was not acknowledged and proved as required by section 2372. The failure to follow the requirements as to acknowledgment and proof of the award does not take from it the character of an award if it were executed and delivered by the arbitrators as an award, and the effect of such defective award is to prohibit them from making another award, as they have become *functus officio*. *Flannery v. Sahagian*, 134 N. Y. 88. But where a paper signed by arbitrators is in manner and form an opinion merely, and is merely the basis of the judgment to be entered, it is not deemed to be a formal award, and its delivery to one of the parties will not deprive the arbitrator of power to make, afterward, an award in due form. *Matter of Beach v. Sterne*, 67 Hun, 341, 22 Supp. 330, 51 St. Rep. 820; *aff'd*, 143 N. Y. 634, 60 St. Rep. 873, 35 Supp. 413.

Upon the making and delivery of an award the arbitrators become *functus officio*, and have no power to perfect it by executing a supplemental award. *Herbst v. Hagenaeers*, 137 N. Y. 290.

It is not necessary that an award should show on its face that all met and heard the matters in controversy, but that may be shown by parol. *Ackley v. Finch*, 7 Cow. 290; *Schulz v. Halsey*, 3 Sandf. 405. Nor need it show on its face that the parties had notice of the hearing. *Butler v. Mayor*, 1 Barb. 325. The fact that the submission is under seal does not make it necessary that the award should be under seal. It is only necessary when the submission requires it. *Owen v. Boerum*, 23 Barb. 187. Since the passage of the Code there is no statute in force which empowers a majority of the arbitrators appointed by private persons to make a valid award, unless the submission is in writing, subscribed by the parties, and duly acknowledged or proved and certified as a deed is required to be for the purpose of being recorded. *Lorenzo v. Deery*, 26 Hun, 447. If arbitrators decline to act, they are no longer arbitrators, and an award made by them is void. Parol evidence is admissible to show that before making their award they resigned, and their resignations were accepted. *Relyea v. Ramsey*, 2 Wend. 602. An award ready to be delivered on payment of fees sufficiently complies with a provision in the submission that the award must be delivered by a certain day. *Ott v. Schroepfel*, 3 Barb. 56. And delivery may be waived. *Perkins v. Wing*, 10 Johns. 143; *Burnap v. Losey*, 1 Lans. 111; *Buck v. Wadsworth*, 1 Hill, 321. Where the arbitrators' bond requires the award to be executed ready for delivery to

the parties, it requires the award to be executed in duplicate, so that each party may have one. Either party may waive this, and if he consents to take a copy, leaving the original with the opposite party, the award is valid though but one is executed. *Gidley v. Gidley*, 65 N. Y. 169. If arbitrators make a void award, their appointment becomes null, because, having expressed an opinion, they are no longer impartial. *Mayor v. Butler*, 1 Barb. 325. The arbitrators declared the amount due the claimant, and that he should pay their costs. Afterward they met again and made a new award, declaring the same amount to be due, but as to costs, simply stating the amount, making no direction as to payment. In an action on the second award, it was held that they had no power to make it, and that the testimony of the arbitrators was inadmissible to show that they did not intend to award costs against the claimant; the first award exhausted their powers. *Doke v. James*, 4 N. Y. 567.

Where an award is void for uncertainty, it cannot be helped by a second one that is void, because the arbitrators can make only one. *Fallon v. Kelehar*, 16 Hun, 266. The award should embrace nothing but the matters submitted; if otherwise, it is void. *Pratt v. Hachett*, 6 Johns. 14; *Butler v. Mayor*, 7 Hill, 329. But in case the portion so in excess of the submission can be separated from the rest, it may be treated as surplusage, and the award should stand as to matters submitted. *Cox v. Jagger*, 2 Cow. 638; *McBride v. Hagan*, 1 Wend. 326; *Gomez v. Garr*, 6 Wend. 583; *Martin v. Williams*, 13 Johns. 264; *Harrington v. Higham*, 15 Barb. 524. An award cannot require one not a party to do an act; if so it is void as to all, unless the unauthorized portion can be separated. *Masten v. Williams*, *supra*. Arbitrators are presumed to have acted upon all matters which were contained in the submission. *Emery v. Hitchcock*, 12 Wend. 156. But in case the award does not embrace all the matters within the submission brought before the arbitrators it is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockroft*, 4 Duer, 133. But it is not an objection that a particular matter contained in the submission was not laid before the arbitrators. The parties are bound to claim all they desire before the arbitrators. *Owen v. Boerum*, 23 Barb. 188; *Ott v. Schroepfel*, 5 N. Y. 486.

The resignation of an arbitrator several days after the award was signed and delivered does not affect the validity of the award, such a resignation being ineffectual. *Eisenberg v. Stuyvesant Ins. Co.*, 87 N. Y. 463.

Precedent for Award (191 N. Y. 437).

IN THE MATTER OF THE ARBITRATION BETWEEN LUKE A. BURKE AND HENRY CORN.

The above-named parties, Luke A. Burke and Henry Corn, having entered into an agreement for arbitration on the 3d day of April, 1905, wherein it was agreed as follows: (Recite submission or its contents.)

The arbitrator therein agreed upon, D. Cady Herrick, does report as follows:

That before entering upon a consideration of the case, he took and filed the oath of office as arbitrator, which is attached to this report; that he has been attended by the parties to said arbitration, and by George Hahn, Esq., attorney for Henry Corn, and by Messrs. Eidlitz & Hulse, attorneys for Luke A. Burke; that he has heard and read the testimony of the witnesses and the documentary evidence provided by both parties to said arbitration, together with the arguments of counsel thereon, and considered their briefs, and after due deliberation upon the evidence produced and the arguments and briefs of counsel, does make the following determination and decision, and render the following award:

That there is due to Luke A. Burke from Henry Corn on account of the matters and things set forth in the said agreement of arbitration, after making deductions and allowances in favor of said Henry Corn from the amount claimed by said Luke A. Burke, the sum of forty-five thousand three hundred eighty-seven dollars and eighteen cents (\$45,387.18), with interest thereon from June 1, 1904, being the sum of five thousand nine hundred dollars and thirty-three cents (\$5,900.33), amounting in the aggregate to the sum of fifty-one thousand two hundred eighty-seven dollars and fifty-one cents (\$51,287.51).

And the said arbitrator does further determine, decide and award, that the said Henry Corn pay the arbitrator's and stenographer's fees of this arbitration.

And the said agreement of arbitration having provided that a judgment of the Supreme Court should be entered upon the award which should be made pursuant to the submission of arbitration, said judgment to be entered in New York county, it is further awarded and decided that judgment of the Supreme Court be entered in the county of New York, in favor of Luke A. Burke and against Henry Corn for the sum of forty-five thousand three hundred eighty-seven dollars and eighteen cents (\$45,387.18), with interest thereon from June 1, 1904, being the sum of five thousand nine hundred dollars and thirty-three cents (\$5,900.33), amounting in the aggregate to the sum of fifty-one thousand two hundred eighty-seven dollars and fifty-one cents (\$51,287.51), together with the arbitrator's and stenographer's fees of the arbitration to be taxed by the clerk.

All of which is respectfully submitted this 1st day of August, 1906.

D. CADY HERRICK,

(Add acknowledgment.)

Arbitrator.

Award, Short Form (134 N. Y. 88).

To all to whom these presents shall come or may concern:

We, Evert K. Baldwin, James W. Prendergast, Frederick Durand, and John C. Campbell, Jr., to whom was submitted as arbitrators the

matters in controversy existing between Aslan Sahagian and Patrick J. Flannery, as by the contents of the statements executed by the said parties respectively and dated the day of more fully appears:

Now, therefore, know ye, that we, the arbitrators mentioned in the said submission, having heard the proofs and allegations of the respective parties and examined the matters in controversy by them submitted therein, do therefore make this award in writing, that is to say, the said Patrick J. Flannery is entitled to recover of the said Aslan Sahagian the final payment due him on his contract, and as certified to by John Rayner, the architect, and that such payment amounts to one thousand three hundred and eleven dollars and forty-one cents (\$1,311.41), and interest thereon for seven months, amounting to thirty-eight dollars and sixty-four cents (\$38.64), making a total of one thousand three hundred and fifty dollars and four cents (\$1,350.04).

In witness whereof we have hereunto subscribed these presents this day of

(Signatures and acknowledgment.)

Subd. 2. Award Must be Definite and Certain.

An award must be certain and definite, so as to show what each party is required to do; if it is sufficiently certain to be obligatory as a contract it is valid, and if the several parts are consistent, and their meaning plain, the award will be upheld. *Schuyler v. Vanderveer*, 2 Caines, 235; *Perkins v. Giles*, 50 N. Y. 228; *Pierson v. Van Marter*, 17 Week. Dig. 183. An award is sufficiently certain though it requires a calculation, if the basis for the calculation is given. *Ludlow v. Grozart*, 3 Johns. Cas. 534. As in an award that defendant pay a certain sum, and each party pay his own witness' fees. *Weed v. Ellis*, 3 Caines, 252. If the submission fixes the time of payment, an award fixing the amount is sufficient. *Gomez v. Garr*, 6 Wend. 583; rev'd on another point, 9 Wend. 549.

On a submission of partnership matters an award requiring one partner to pay the partnership debts is sufficiently certain. *Case v Ferris*, 2 Hill, 75. And where a pending action is referred to arbitrators, an award for a sum and costs to which he has been subjected is sufficiently certain. *Boughton v. Seamans*, 9 Hun, 392. So an award on a boundary question is sufficient if it shows enough to enable each party to decide if his possession corresponds with the line. *Bacon v. Wilbert*, 1 Cow. 117. As an instance of sufficient award, see *Cutler v. Cutler*, 48 N. Y. Super. 470. An otherwise indefinite award may be cured by the recital. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160; *Butler v. Mayor*, 7 Hill, 329; *Mayor v. Butler*, 1 Barb. 325. An award incomplete on its face may be supplemented by parol evidence, and the rule requiring an

award to be certain only requires that the meaning of the parties can be ascertained when all the evidence is before the court. When a portion of an award is void for uncertainty, it does not vitiate the residue if, by striking out the defective portion, a substantial, definite, and unobjectionable award remains. *Becker v. Bowen*, 61 N. Y. 317. An award that a contractor is entitled to his full bill, after deducting the bills paid him by persons named, is void for uncertainty. *Fallon v. Kelehar*, 16 Hun, 266. To same effect, *Wait v. Barry*, 12 Wend. 377.

Where an award made on submission of a controversy to arbitrators under the Code of Civil Procedure does not appear upon its face to be definite and final, and does not contain the data or means of working out a definite and final determination of the whole controversy submitted, it must be set aside. *Herbst v. Hagenaers*, 137 N. Y. 290.

Subd. 3. Award Must be Final.

It is said in *Hiscock v. Harris*, 74 N. Y. 109, that there are certain fundamental requisites and properties which awards must possess; among other things they must be within the submission, certain, and to a common intent and final. They must be within the submission, because to no other subjects or questions than to those embraced therein does their authority extend; they must be certain, that parties may know their rights and obligations; and they must be final, that the parties may not be remitted to a new controversy. The award in question in that action is then held to be void, among other things, for uncertainty.

Where there is a submission of all questions, and an intent appears to have everything decided, if anything is decided, an award deciding part only is void. An award that all causes of action were merged in and discharged by a contract, and ordering judgment and dismissing the complaint, but concluding that it is not intended to determine the rights of either of said parties under the contract, is not final and definite and should be set aside. *Jones v. Wellwood*, 71 N. Y. 208. It would be fatal to the award if any portion of the matters in dispute submitted to the arbitrator should be found not to have been decided by him, although the question whether an award is invalid does not depend on any absolute rule of law requiring the determination of all the matters submitted to give validity to an award, but upon the terms of the submission. *Merritt v. Thompson*, 27 N. Y. 225.

The reservation, by arbitrators, of a power over the thing submitted shows the award not to be final, and with this fundamental defect in an award it is void, and parties have a right to insist upon a legal objection. *Hiscock v. Harris*, 74 N. Y. 109. But this cannot be shown *dehors* the record. *Todd v. Barlow*, 2 Johns. Ch. 551. But an award by arbitrators who are empowered to determine the disposition of partnership property in payment of partnership debts is not void because it does not dispose of all the assets, unless the submission expressly provides that it must do so. It is valid as to all assets of which it disposes, and the others remain, as before, the joint property of the partners. *Backus v. Fobes*, 20 N. Y. 204. While all matters submitted must be embraced in the award, it will be presumed this is done, but if the contrary appears award is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockcroft*, 4 Duer, 133. An award which leaves nothing to be done, except some ministerial act, as selecting from a designated stock, is final. *Owen v. Boerum*, 23 Barb. 187. An award of payment of a specific sum stated that the party had a just claim to it, or more if insisted upon. It was held that the award was final, though no release was directed, and it was to be intended that the claimant consented to the reduction of the sum. *Solomons v. McKinstry*, 13 Johns. 27.

An award must be vacated when the same does not show upon its face that it is definite and final and does not contain data for working out a definite and final determination of the controversy submitted. Upon the making and delivering of such a defective award, the arbitrators have no power to perfect it by a supplementary award, they being *functus officio*. *Herbst v. Hagenaeers*, 137 N. Y. 290, 50 St. Rep. 687, *aff'd* 62 Hun, 568, 43 St. Rep. 54, 17 Supp. 58.

Where the award does not in itself contain the data or means of working out a definite and final determination of the sole controversy, the powers conferred upon the arbitrators have not been fully executed and the provisions of the Code are imperative that it must be set aside. *Hicks v. Magoun*, 38 App. Div. 573, 56 Supp. 484; *aff'd*, 167 N. Y. 540.

Where all questions were submitted to the arbitrators and they state that they have passed upon all the proofs and allegations as submitted, there is a conclusive presumption that all questions were passed upon in the absence of conclusive proof that they were not passed upon. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 30, 1 Supp. 442; *aff'd*, 119 N. Y. 475.

Subd. 4. Costs May be Awarded.

It is held that a necessary incident of an arbitration is the awarding of costs. *Strang v. Ferguson*, 14 Johns. 161; *Nicholas v. Rens. Co. Mutual Ins. Co.*, 22 Wend. 125; *Cox v. Jagger*, 2 Cow. 638. And to the contrary see *Trustees of Amsterdam v. Vanderveer*, 4 Denio, 249; *People v. Newell*, 13 Barb. 86; *Akeley v. Akeley*, 17 How. 21. But if the subject of the controversy is an action then pending in court, the arbitration may award as to the costs of the action without express authority, and also as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 251. An award in a matter submitted to arbitration while a suit was pending on an appeal from a judgment of a justice of the peace that plaintiff recover \$25 and the costs, if any recovery before such justice, gives only such costs as are then owing and unpaid. *Willey v. Shaver*, 4 Hun, 797.

It appeared that when the arbitrators had made their award the parties were notified, but delivery was withheld until payment of the fees and expenses. No time for the delivery of the award was fixed by the submission. The case showed that the arbitrators were requested to make frequent inspections of the work in progress and to give directions about it. Held, that the authority to award against one or both of the parties the costs of the arbitration was incident to the general submission, and the arbitrators had a right to hold the award as security for the payment of their charges in the absence of a condition in the agreement of submission to the contrary. *N. Y. L. & W. W. Co. v. Schneider et al.*, 119 N. Y. 475.

The fact that the action has been discontinued or abated by the submission to arbitration, so that no costs can thereafter be recovered therein, does not prevent the arbitrators from allowing the amount thereof to the plaintiff. *Boughton v. Seamans*, 9 Hun, 392.

Subd. 5. Effect of Award.

The award settles and quiets all matters fairly within the meaning and intent of the submission. The award acts as a judgment. *Lowenstein v. McIntosh*, 37 Barb. 251. It does not invalidate an award because it does not dispose of certain personal property belonging to a firm, the disposition of which was submitted to arbitrators on the hearing. This was upon the ground that such disposition was not required by the submission. *Backus v. Fobes*, 20 N. Y. 204. The penalty of the bond is only regarded in case of revocation. Where the submission is revoked, in ascertaining the

amount to be awarded, the arbitrators are not limited to that sum. *Ex parte Wallis*, 2 Cow. 522.

Judgment cannot be entered upon an award not acknowledged, proved, or certified according to the requirements of this section, and if such an award is entered it may be set aside. *Matter of Grening*, 74 Hun, 62, 56 St. Rep. 196. The failure of arbitrators properly to acknowledge and prove the award, as required by this section does not rob it of its character of an award, and they cannot thereafter make a subsequent award. *Flannery v. Sahagian*, 134 N. Y. 87. But this section requiring the award to be in writing, and acknowledged, proved, or certified in a like manner as a deed to be recorded, applies only to arbitrations under the Code, and does not apply to common-law arbitrations. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 30, 1 Supp. 442; aff'd, 119 N. Y. 475, 29 St. Rep. 596.

When the arbitration is a common-law arbitration and the method adopted is informal, and the award is never confirmed, nor is any judgment entered thereon, such arbitration may yet be good at common law; and, if so, an award between the parties has the same force and effect as a final judgment in regard to all matters within the scope of the submission. *Burhans v. Union Free School District*, 24 App. Div. 429, 48 Supp. 702; aff'd, 165 N. Y. 661.

A valid award has the binding effect of a judgment as between the parties, and is a bar to a suit for the original cause of action. *Shepherd v. Watson*, 3 Caines, 166; *Wheeler v. Van Houten*, 12 Johns. 311; *Fidler v. Cooper*, 19 Wend. 285; *Wells v. Lain*, 15 Wend. 99; *Diedrick v. Richley*, 2 Hill, 272; *Wilberly v. Matthews*, 91 N. Y. 698; *Lowenstein v. McIntosh*, 37 Barb. 251; *Coleman v. Wade*, 6 N. Y. 44. Even though the award has not been performed. *Brazill v. Isham*, 12 N. Y. 9. When the submission is general of all demands which either party has against the other the award is a bar to any demand existing at the time of the submission. *Wheeler v. Van Houten*, 12 Johns. 311. See *Taylor v. Remington*, 51 N. Y. 663. Although the terms of a submission may be sufficiently broad to render a particular claim the proper subject of trial, yet if the award does not on its face appear to include any adjudication thereon, evidence is admissible to show that proof of such claim was not heard, but was in fact excluded by the arbitrators, and the award will not conclude the parties with respect to such claim. *Morss v. Osborn*, 64 Barb. 543. Although an award cannot operate as a conveyance of land, it is effectual by way of preventing a party from disputing title. *Cox v. Jagger*, 2 Cow. 638. Upon the strength of an award

upon a question of boundary the party in whose favor it is may recover in ejectment. *Robertson v. McNeil*, 12 Wend. 578; *Sellick v. Adams*, 15 Johns. 197. An award on a legatee's claim against an executor before the surrogate, held binding on the accounting. *Valentine v. Valentine*, 2 Barb. Ch. 430. An award made against the estate of a deceased person under a submission made by his personal representatives ascertains and liquidates the claim, but gives no priority of payment over other creditors, nor does an award of payment absolutely have that effect, though it may bind the representatives personally. *Wood v. Tunnickliff*, 74 N. Y. 38. An award must be pleaded to be a defense and cannot be shown under a general denial. *Brazill v. Isham*, 12 N. Y. 9.

An award not having been attacked for fraud, corruption, misconduct, or other reason assigned under sections 2374 and 2375, and the motion for confirmation not having been opposed, action to set it aside will not lie upon the ground the arbitrator erred in his conclusion of law. *Dobson v. Central R. R. Co. of N. J.*, 38 Misc. 582, 78 Supp. 82.

The conclusiveness of an award is based upon the principle that the parties having chosen judges of their own and agreed to abide by their decision, they are bound by their agreement and compelled to perform the award. *Matter of Wilkins*, 169 N. Y. 494.

An award is conclusive until set aside. *Mayer v. Phoenix Assur. Co., Ltd.*, 124 App. Div. 241, citing *Remington Co. v. London Assur. Corp.*, 12 App. Div. 218; *Fleming v. Phoenix Assur. Co.*, 75 Hun, 530.

An award of arbitrators acting within their jurisdiction, untainted by corruption, fraud or like misconduct, operates as a final conclusive judgment and must be submitted to, however unsatisfactory and disappointing it may be to the parties to the arbitration agreement. *Ehrlich v. Pike*, 53 Misc. 328, 104 Supp. 818.

Where the award is divisible, though it is void as to a part for being outside the submission, the parties are bound by the part that is good. *Stinesville & Bloomington Stone Co. v. White*, 32 Misc. 135, 65 Supp. 609.

As soon as arbitrators appointed under this title have made and delivered their award they become *functus officio* and their power is at an end. After having fully exercised their judgment upon the facts and reached a conclusion which they have incorporated into an award they are not at liberty at another and subsequent time to exercise a fresh judgment on the case and alter their award; and

this although the award was not acknowledged or proved as required by section 2372. *Flannery v. Sahagian*, 134 N. Y. 87; *Herbst v. Hagenaeers*, 137 N. Y. 292.

In legal contemplation an award takes effect when ready for delivery and the parties have been notified to that effect. *N. Y. L. & W. W. Co. v. Schneider*, 119 N. Y. 475.

Under an arbitration clause in a policy of insurance it is the duty of the parties to the contract to act in good faith to accomplish the appraisal in the way provided; and if either acts in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and so when one arbitration fails from default of one of the parties the other is not bound to enter into a new arbitration agreement. *Uhrig v. Williamsburg City Fire Insurance Co.*, 101 N. Y. 362.

When a real controversy is submitted to arbitration it is mutual and based upon a sufficient consideration. The fact that it afterward appears that one of the parties derived no benefit therefrom does not permit it to repudiate the agreement upon the general ground of lack of consideration. *Green-Shrier Co. v. State Realty & M. Co.*, 199 N. Y. 65, rev'g 129 App. Div. 581, 114 Supp. 49.

Where an award is void in one particular, and that is the only act which the party is directed to do and is the consideration intended for the act required of the other party, the whole is void. *Brown v. Hankerson*, 3 Cow. 70.

ARTICLE V.

MOTION TO CONFIRM, VACATE, MODIFY, OR CORRECT AWARD.

- § 2373. *Motion to confirm award*, 118.
- § 2374. *Id.*; *to vacate award*, 119.
- § 2375. *Id.*; *to modify or correct award*, 119.
- § 2376. *Motions; when to be made*, 119.
- § 2377. *Costs on vacating award*, 119.
- Subd. 1. *Practice on motion to confirm or vacate award*, 119.
- Subd. 2. *General rules governing vacating of awards*, 122.
- Subd. 3. *When award vacated for excess of jurisdiction*, 127.
- Subd. 4. *When award vacated for misconduct of arbitrators*, 128.

§ 2373. Motion to confirm award.

At any time within one year after the award is made as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed in the next two sections. Notice of the motion must be served, upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same

court. In the Supreme Court, the motion must be made within the judicial district, embracing the county where the judgment is to be entered.

§ 2374. Id.; to vacate award.

In either of the following cases, the court specified in the submission, must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud, or other undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject-matter submitted, was not made.

Where an award is vacated, and the time, within which the submission requires the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

§ 2375. Id.; to modify or correct award.

In either of the following cases, the court, specified in the submission, must make an order modifying or correcting the award upon the application of either party to the submission:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.
3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award, so to affect the intent thereof, and promote justice between the parties.

§ 2376. Motions; when to be made.

Notice of a motion to vacate, modify, or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion, upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 2377. Costs on vacating award.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

Subd. 1. Practice on Motion to Confirm or Vacate Award.

Where an arbitration is not a statutory arbitration, but is a common-law arbitration, the courts cannot set aside an award otherwise than by action. To set aside an award upon motion, it must be a statutory arbitration. *In re Dicarlo*, 13 Supp. 83.

On application to vacate an award the court may go behind the award and inquire as to what took place before the arbitrators. *Matter of Williams*, 4 Denio, 194; *Butler v. Mayor*, 7 Hill, 329. But the arbitrators cannot give evidence for the purpose of impeaching the award or to contradict it. *Mayor v. Butler*, 1 Barb. 325; *French v. New*, 20 Barb. 481; *Campbell v. Western*, 3 Paige, 124; *Harrington v. Hamblin*, 12 Wend. 212. But they may give evidence to show that they did not consider a particular matter, or that matters were contained in the award not in the submission. *Morris v. Osborn*, 64 Barb. 543; *Mayor v. Butler*, 1 Barb. 325; *Briggs v. Smith*, 20 Barb. 409.

The rule that arbitrators cannot give evidence to impeach the award does not apply where an umpire has been chosen. 1 Barb. 325, *supra*. Nor does it apply to an arbitrator who has not signed an award made by the majority of the arbitrators. *Arbitration of National Bank v. Darragh*, 17 Week. Dig. 290. Awards are to be liberally construed for the purpose of upholding them. *Jackson v. Amber*, 14 Johns. 96; *Fudickar v. Ins. Co.*, 62 N. Y. 392.

Under a submission by which parties submitted all, and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever now pending between them to an arbitrator to decide the same, his decision to be final, an award made thereunder can only be attacked in a case prescribed by sections 2374 and 2375, since by section 2373 the court must grant an order confirming the award unless it is vacated, modified, or corrected as prescribed in those two sections. *Matter of Burke*, 191 N. Y. 437; *aff'd*, 117 App. Div. 477, 102 Supp. 485.

The proceeding provided for vacating, modifying, or correcting an award is a motion, to support which the affidavits or papers, upon which it is intended to be founded, must accompany the notice of motion, and from the order made thereon an appeal may be taken and heard upon the same papers upon which appeals from orders are heard in other cases. *Matter of Poole v. Johnston*, 32 Hun, 215.

A motion to vacate an award for the wrongful and improper behavior of the arbitrators may be made upon an affidavit of one of the arbitrators who refused to sign the award because he considered the conduct of the other arbitrators to be illegal and unfair. *Nat. Bank of the Republic v. Darragh*, 30 Hun, 29; *aff'd*, 93 N. Y. 655.

Notice of Motion.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER OF THE ARBITRATION BE-
TWEEN HARRY N. GITT AND JULIUS
MARQUSEE.

138 App. Div. 147.

Sir: Please take notice, That upon the award of Aaron J. Bach, Frank F. Peard and John H. Duys, the arbitrators herein, bearing date the 10th day of February, 1910, and duly filed in the office of the Clerk of the County of New York on the 10th day of February, 1910, and upon the annexed affidavit of Julius Marqusee, verified the 14th day of February, 1910, a copy of which is herewith served upon you, and upon all the proceedings had herein, the undersigned will move this court, at a Special Term, Part I, thereof, to be held at the New York County Court House, in the Borough of Manhattan, New York City, on the 21st day of February, 1910, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order confirming the said award of the said arbitrators, and for such other and further relief as to the court may seem just, together with costs.

Dated, New York, February 14, 1910.

Yours, etc.,

RIEGELMAN & BACH,

Attorneys for Julius Marqusee.

(Same title.)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Julius Marqusee, being duly sworn, deposes and says: I am one of the parties to the arbitration herein. On or about the 7th day of January, 1910, Harry N. Gitt and myself entered into an agreement of arbitration by the terms of which the parties thereto agreed to submit their controversies and claims to Aaron J. Bach and Frank F. Peard, as arbitrators, to judge and determine the same, a copy of which arbitration agreement is hereto annexed and made a part hereof; that by the terms of said arbitration agreement it was agreed that the said arbitrators could, at any time in the proceeding or before the commencement thereof, select and appoint a third person as an additional arbitrator, such appointment to be in writing and a copy thereof to be delivered to each of the parties to said agreement. In accordance therewith said Aaron J. Bach and said Frank F. Peard selected and appointed John H. Duys as the additional arbitrator, and the selection of said third arbitrator was made in writing; and I am informed that notice of said selection was served upon Harry N. Gitt as well as upon myself.

Thereafter the said arbitrators duly met from time to time and heard the testimony and the evidence of the parties hereto and the evidence of such witnesses as the parties hereto produced before them, and the said three arbitrators, having duly considered the testimony duly reached a determination and have duly filed their finding or award, bearing date the 10th day of February, 1910, in the office of the Clerk of the County of New York on the 10th day of February, 1910, in accordance with the terms of said arbitration agreement, for the sum of nineteen thousand nine hundred ninety-nine and fifty-six one-hundredths (\$19,999.56) dollars in favor of Julius Marqusee and against Harry N. Gitt.

Wherefore, deponent asks that an order may be made confirming the award of the said arbitrators, and for judgment thereon, in accordance with the provisions of the Code of Civil Procedure of the State of New York and the terms of the said arbitration agreement, together with costs.

(Verification.)

JULIUS MARQUEE.

Order to Show Cause Why Award Should Not Be Modified
(Same title.)

Upon the annexed affidavits of Henry Corn and George Hahn, verified respectively the 10th day of September, 1906, let Luke A. Burke, or his attorneys, show cause before one of the justices of this court, at Special Term thereof, to be held in Part I, in the County Court House in the City of New York, on the 14th day of September, 1906, at 10:30 o'clock, a. m., or as soon thereafter as counsel can be heard, why the award of the arbitrator herein, Hon. D. Cady Herrick, in the above-entitled matter, bearing date August 1, 1906, and filed in the office of the Clerk of the County of New York on August 2, 1906, should not be modified and corrected by striking therefrom the award of five thousand nine hundred dollars and thirty-three cents (\$5,900.33) interest, and why the said Corn should not have such other and further relief in the premises as may be just and proper.

Service of a copy of this order and of the annexed affidavits on or before the 11th day of September, 1906, shall be sufficient.

Dated, New York, September 11, 1906.

VICTOR J. DOWLING,
Justice of the Supreme Court.

Order Confirming Award (169 N. Y. 494).

(Title.)

(Caption.)

On reading and filing the notice of motion, dated the day of, and due proof of service thereof, and on the submission and award herein filed in the office of the Clerk of the County of New York on day of, after hearing Robert H. Hutchins, in support of said motion, and Edward J. Meegan in opposition thereto, on motion of Parsons, Shepard & Ogden, attorneys for Charlotte L. Wilkins, it is

Ordered, that the said award be and it hereby is confirmed, and judgment directed thereon according to statute.

Enter:

HENRY R. BECKMAN,
J. S. C.

Subd. 2. General Rules Governing Vacating of Awards.

In *Fudickar v. Guardian Mutual Life Insurance Co.*, 45 How. 462, 37 N. Y. Super. 358; aff'd, 62 N. Y. 392, it is held that where all the proofs and proceedings before the arbitrator are not put in evidence in an action to set aside the award the court will presume that the facts necessary to sustain his rulings were established before him. The general rule that the court will not interfere with an award except for fraud, corruption, partiality, or misconduct on the part of the arbitrator, or excessive or imperfect use of the powers conferred,

or gross mistake as to which there can be no controversy, is reiterated with the qualifications that the rule does not apply where the arbitrator by statements in the award or opinion of his intention to be governed by strictly legal rules has conferred upon the court a power of inquiry and revision. In *Halsted v. Seaman*, 82 N. Y. 27, some of the rules applicable to awards are stated to be that the refusal of an arbitrator to hear testimony which is pertinent and material is sufficient misconduct to authorize the setting aside of his award, though he may think he has sufficient other evidence. The construction by arbitrators of the submission to them is not conclusive; it is for the court to determine whether they have exceeded their powers or refused to exercise them. The general rule that the decisions of arbitrators on the mere ground that they are erroneous are not reviewable applies only to matters submitted to them. *Fudickar v. The Guardian Mut. Ins. Co.*, 62 N. Y. 392, is cited with approval. That case holds, among other things, that any violation of material justice, such as receiving material evidence from one party without the knowledge or consent of the other, should be condemned. The two cases give very fully the principles now applied by the courts to the review of awards made by arbitrators, and the earlier cases of *Herrick v. Blair*, 1 Johns. Ch. 101; *Campbell v. Western*, 3 Paige, 124; *Dater v. Wellington*, 1 Hill, 319, and *Turnbull v. Martin*, 37 How. 20, must be read in the light of these later decisions. See also *Van Cortlandt v. Underhill*, 17 Johns. 405.

The award of an arbitrator cannot be set aside for mere errors of judgment as to the law or facts. If the arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption, or other misconduct affecting his award it is unassailable. *Masury v. Whiton*, 3 N. Y. 679.

Although if a mistake is made in ascertaining the amount due it is a good defense to an action on an award, a general allegation that the arbitrators "made a mistake in such computation, which mistake was a clerical error and that the award was the result of such clerical error" is sufficient. *Garvey v. Carey*, 35 How. 382. If special matters are submitted the award is not void because it directs a general release, since it will inure only to the matter submitted. *Munro v. Alaire*, 2 Caines, 320. Where a party has with full knowledge accepted and executed an award it should not be set aside. *De Castro v. Brett*, 56 How. Pr. 484. An award cannot be impeached collaterally by showing that the arbitrators erred in receiving evidence. *Viele v. T. & B. R. R. Co.*, 21 Barb. 381; aff'd on another point,

20 N. Y. 184. On a motion to vacate an award on the ground that improper evidence has been received the question is whether such evidence has been received which, by any probability, may have affected the conclusion of the arbitrators, and not whether such evidence was considered by them in making their award. If the evidence was received it is impossible for the court to say that it did not affect the conclusion of the arbitrators. *Arbitration, National Bank v. Darragh*, 17 Week. Dig. 290.

Where the award of arbitrators is severable that which is improper may be rejected, allowing the balance which is proper to stand. *Shrump v. Parfit*, 84 Hun, 341.

An award requiring a release by a married woman, who was not strictly a party to the arbitration, is good if the release is tendered. *Smith v. Sweeney*, 35 N. Y. 291. Where the submission of the question of boundary disclosed that the arbitrators were to be governed by an original tier lien it was held that the conclusion of the arbitrators, as to where that line was, was conclusive. *Robertson v. McNeil*, 12 Wend. 578. Where the arbitrators awarded damages for slander the defendant cannot resist payment on the ground the words were not actionable. *Shephard v. Watrous*, 3 Caines, 166. See *French v. New*, 20 Barb. 481; rev'd on another point, 28 N. Y. 147. Where arbitrators opened an account stated the award was sustained. *Emmet v. Hoyt*, 17 Wend. 410.

Where after a case has been closed one of three arbitrators produces and exhibits to the others, in the absence of the parties, written testimony signed by a competent witness which relates to one of the controverted issues, the award should be set aside if it could by any possibility have been affected by the evidence so received. The fact that the strong preponderance of the testimony seems to show that the new evidence was not received or considered by the arbitrators in making their award will not be sufficient to sustain it. *Nat. Bank of the Republic v. Darragh*, 30 Hun, 29; aff'd, 13 N. Y. 655.

Judge Vann, in *Sweet v. Morrison*, 116 N. Y. 19 (33), says: "The merits of an award, however unreasonable or unjust it may be, cannot be reinvestigated; for otherwise the award instead of being the end of the litigation would simply be a useless step in its progress." *Morris Run Coal Co. v. Salt Co.*, 58 N. Y. 667; *Perkins v. Giles*, 50 N. Y. 228.

It must appear upon the face of the award that the arbitrators have mistaken the law to enable the court to set aside the award on that ground. If it appear from the award that the arbitrators in-

tended to decide the case according to the law and the grounds for their decision are set out, which in law do not justify it, the case is brought within the exception to the general rule and the court will set it aside. But it is not necessary that it should appear by express statement in the award that the arbitrators intended to decide according to law in order to give the court the power of review. It is sufficient if this be shown by clear and necessary inference. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392 (401).

If a verdict would not be set aside on same facts an award will be sustained. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160. And an award will not be opened on the subsequent discovery of a receipt. *Todd v. Barlow*, 2 Johns. Ch. 551. In *Dater v. Wellington*, 1 Hill, 319, under a submission by partners as one party to a controversy, an award against one of them was sustained. Under submission of a claim against an insurance company the arbitrators besides awarding a sum provided that the claimant should assign his claim to another company, *held* within the powers of the arbitrators. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125. But an award requiring a party to do an act which it does not appear the party can control is void to that extent. *Martin v. Williams*, 13 Johns. 264. As is an award that a sum claimed from a third party is invalid and not a bar to an action. *Brazil v. Isham*, 1 E. D. Smith, 437; *aff'd* on other grounds, 12 N. Y. 9. A verbal award is not valid unless a verbal submission of the matters on which it is made would be binding. The fact that one of the parties by consenting to a verbal award prevented the arbitrators from making a valid award will not deprive him of the right to show the invalidity of the one made. *French v. New*, 28 N. Y. 147.

An award is not invalid because it was discussed and practically agreed upon on Sunday, where it was not made, published, nor delivered until the following day. *Ehrlich v. Pike*, 53 Misc. 328.

The introduction of a discussion by the attorney for the defendants in the presence of the arbitrators of the amount of compensation to be paid them, in the course of which the attorney for the plaintiff said he represented an association and could not stipulate in relation thereto without consulting his principal, and the attorney for the defendants rejoined that he would see the arbitrators paid, adding, "We control that under the lease," although improper, will not invalidate the proceedings of the arbitrators where the plaintiff took the chances of securing a favorable award and made no objection on that ground to proceeding with the arbitration and brought

no action until after an adverse award had been rendered. *Atterbury v. Trustees of Columbia College*, 66 Misc. 273, 123 Supp. 25.

Where a submission agreement was so defective that the proceedings did not amount to a statutory arbitration, so that the court had no power to order judgment on the award, it had no power to vacate the award. *Electric Steel Elevator Co. v. John Kam Malting Co.*, 112 App. Div. 686, 98 Supp. 604.

The resignation of an arbitrator several days after the award was signed and delivered does not affect the validity of the award, such a resignation being ineffectual. *Eisenberg v. Stuyvesant Ins. Co.*, 87 Supp. 463.

In cases of doubt the presumption is in favor of an intention that all matters should be decided. The parties to an arbitration have the right to submit only a portion of the subjects involved, and an award will not be set aside for not including matters not brought to the attention of the arbitrators. It seems, however, that a partial award in any case will only be sustained when the matters omitted are not necessarily dependent upon and connected with the other points. *Jones v. Welwood et al.*, 71 N. Y. 208.

Where upon an arbitration to settle partnership accounts one of the three arbitrators is an accountant chosen for the express purpose of examining the books involved in the controversy and to save the other arbitrators that trouble and he accordingly prepares a statement which the arbitrators use in making their award, a claim that such arbitrator thus became an expert witness and that his testimony was irregularly received in the absence of the defeated party is untenable, where opportunity to inspect the books was extended to the other arbitrators and to the parties. *Ehrlich v. Pike*, 53 Misc. 328.

A witness was called by plaintiff on the hearing before the arbitrator for the purpose of proving statements of one of defendant's witnesses showing bias and prejudice on his part. He was excluded by the arbitrator under a rule adopted by consent of the parties to the effect that persons who were expected to be examined as witnesses should be excluded from the room except while testifying. *Held*, that while an award will be set aside for a refusal of the arbitrator to receive competent evidence on the merits, the rejection of the evidence offered under a mistaken construction of the rule was not sufficient cause for setting it aside. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392.

After the case before the arbitrator was substantially closed the arbitrator wrote to defendant for a further statement, which it ren-

dered. It appeared that the arbitrator advised the plaintiff of the purport of the letter before it was sent out, and afterward exhibited the letter and statement to him. Plaintiff made no objection, but examined the statement and claimed the right to introduce proof in respect to it. The arbitrator consented in case he concluded to regard the statement; to this arrangement plaintiff assented. The arbitrator did not consider the statement in making his award. *Held*, that the action of the arbitrator would have been cause for opening the award had it not been assented to by plaintiff, but that this was a waiver of the objection. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392.

The plaintiffs and defendants, members of the New York Produce Exchange, voluntarily submitted to the arbitration committee thereof a dispute arising out of a transaction in petroleum. The committee having decided in favor of the defendants the plaintiffs brought this action to restrain them from entering judgment on the award on the ground that the arbitrators had not been sworn and that they had received illegal evidence. *Held*, that the plaintiffs by appearing before the committee, making their statements, discussing their case and the whole controversy, and interposing no objection to the proceedings in any respect, had waived any such irregularities on the part of the arbitrators. The power to adjourn rests in the sound discretion of the committee, but its proceedings in this respect are nevertheless subject to review and may be annulled if it appear that the discretion has been abused. *Sonneborn v. Lavarello*, 2 Hun, 201.

In an action to compel specific performance of an agreement to make a lease of property for ten years at a rental of 5 per cent. of the value of the property at the time of making the lease, such value to be determined by arbitrators, it is reversible error for the trial court to exclude evidence on the part of the defendant that the said defendant was at the time agreed upon for such appraisal and execution of the lease an incompetent person. *Wurster v. Armfield*, 175 N. Y. 256, rev'g 67 App. Div. 158, 73 Supp. 609.

Subd. 3. When Award Vacated for Excess of Jurisdiction.

The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment, either in fact or in law. *McGregor v. Sprott*, 13 Supp. 191.

The fact that the arbitrators took into consideration matters not

submitted to them is admissible in an action on an award, and if they did so and the court cannot distinguish so as not to affect the justice of the case, the whole award is void. *Briggs v. Smith*, 20 Barb. 409; *Butler v. Mayor*, 7 Hill, 329; s. c., 1 Barb. 325; *Hiscock v. Harris*, 74 N. Y. 109. If an arbitrator exceeds his authority it is immaterial whether it is done consciously or by mistake. *Borrowe v. Milbank*, 6 Duer, 680. But there is a presumption that the arbitrators have acted within the submission till the contrary appears; *Solomons v. McKinstry*, 13 Johns. 27; *Pierce v. Morrison*, 6 Hun, 235; and even though the terms of an award are less comprehensive than the submission the award is good unless it appears that the matters submitted were brought before the arbitrators which are not embraced in the award. *Ott v. Schroepfel*, 5 N. Y. 482. An entire award is not necessarily to be rejected because in some respects in excess of the submission, or invalid under the statute, if the objectionable parts can be separated. *Locke v. Filley*, 14 Hun, 139; *Martin v. Williams*, 13 Johns. 264; *Cox v. Jagger*, 2 Cow. 638; *Jackson v. Ambler*, 14 Johns. 96; *Doke v. James*, 4 N. Y. 567; *Keep v. Keep*, 17 Hun, 152; *Harrison v. Higham*, 15 Barb. 524; *Bacon v. Wilbur*, 1 Cow. 117. Otherwise if the parts are dependent. *Schuyler v. Vanderveer*, 2 Caines, 235; *Jones v. Wellwood*, 71 N. Y. 208.

The court will not set aside an arbitration where the arbitrators have erred only in regard to a question of law or fact. *Jackson v. Ambler*, 14 Johns. 96; *Campbell v. Western*, 3 Paige, 124; *Winship v. Jewett*, 1 Barb. Ch. 173; *Ketcham v. Woodruff*, 24 Barb. 147; *Emmett v. Hoyt*, 17 Wend. 410. When the award is within the limit of the submission and there is no evidence of fraud courts will not ordinarily interfere with the determination. *Matter of Roosevelt v. Nichols*, 6 Week. Dig. 437. An award will not be set aside for error either of law or fact relating to matters within the jurisdiction of the arbitrators. There must be either misconduct, or corruption, or a mistake, or a clerical error, and in general this must appear on the face of the award or in some paper delivered with it. *Morris Run Coal Co. v. Salt Co. of Onondaga*, 58 N. Y. 667.

Subd. 4. When Award Vacated for Misconduct of Arbitrators.

Where an arbitrator had before his selection examined the property he was to appraise and expressed an opinion as to its value, and the award was clearly excessive, it was held to show partiality and misconduct. *Smith v. Cooly*, 5 Daly, 401. But the fact that previous to the arbitration one of the arbitrators consulted with defend-

ant and told him the claim was too high does not show such partiality, corruption, or gross misbehavior as to invalidate the award. *French v. New*, 20 Barb. 481; rev'd on another point, 28 N. Y. 147. An award cannot be objected to on the ground that the arbitrator did not hear the evidence if it appears that the parties waived a hearing and expected and intended that he should make his decision upon his personal knowledge. *Wiberly v. Matthews*, 91 N. Y. 648. Nor does the fact that the plaintiff communicated with his proposed arbitrator with reference to the controversy avoid the award, although the amount awarded is large. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160.

An award will be set aside if the rights of the parties have been prejudiced by the misbehavior of the arbitrators, or if the arbitrators before taking testimony have not taken the oath and the same is not waived by the parties, or if the arbitrators fail to administer the oath to witnesses, or if the umpire selected by arbitrators uses previous testimony taken before the arbitrators without rehearing the same, or if the award is not acknowledged, proved, or certified according to the requirements of section 2372. *Matter of Grening*, 74 Hun, 67, 56 St. Rep. 197. If arbitrators keep within their jurisdiction their award will not be set aside for errors of law or fact upon the part of the arbitrators, but only for corruption, fraud, or misbehavior; and where an award is severable that part of it which is proper may be allowed to stand while improper parts may be vacated. *Shrump v. Parfitt*, 84 Hun, 342, 33 Supp. 409, 67 St. Rep. 242.

In an arbitration between an insurance company and one assured, when it appears that the arbitrator appointed is an agent or advocate of the insurance company after the company represented the arbitrator to be a disinterested person, the award should be set aside as obtained by fraud and the assured allowed a remedy by action. *Bradshaw v. Agricultural Ins. Co.*, 42 St. Rep. 79, 16 Supp. 640. But an award will not be set aside where the arbitrator was a cousin to one of the parties and was a guest at his house during the hearing of the controversy, in the absence of evidence of undue partiality or fraud. *McGregor v. Sprott*, 13 Supp. 192, 35 St. Rep. 908.

An award may be set aside for partiality or corruption of the arbitrators. *Smith v. Cutler*, 10 Wend. 590; *Ennist v. Hoyt*, 17 Wend. 410. But in order to justify a court in interfering on this ground the facts should be clearly shown. *Wood v. A. & R. R. R.*, 8 N. Y. 168; *Perkins v. Giles*, 50 N. Y. 228. The misconduct and

misbehavior which under the statute authorize vacating an award must be acts which evince unfairness, and not merely error of judgment, no matter how great. *Smith v. Cutler*, 10 Wend. 590; *Ketcham v. Woodruff*, 24 Barb. 147; *Perkins v. Giles*, 50 N. Y. 228; *De Castro v. Brett*, 56 How. 484.

The refusal of an arbitrator to hear testimony which is pertinent and material is sufficient misconduct to authorize the setting aside of his award, although he may think he has sufficient other evidence. *Halstead v. Seaman*, 82 N. Y. 27.

It is misconduct for arbitrators to appoint a session on Sunday against the protest of one of the parties, as they sit as a court and are under the prohibition of Code, section 6, against sitting on Sunday a transacting any business except to receive a verdict or discharge a jury. It is misconduct for the arbitrators before whom one party appears with counsel to refuse an adjournment to enable the other party, who has appeared without, to get counsel. *Matter of Picker*, 130 App. Div. 88, 114 Supp. 289, 1 Civ. Pro. 132.

ARTICLE VI.

JUDGMENT OF AWARD AND APPEAL THEREFROM. §§ 2378-2381.

§ 2378. *Judgment on award; when and how entered. Costs*, 130.

§ 2379. *Judgment roll*, 130.

§ 2380. *Effect of judgment; how enforced*, 131.

Subd. 1. Judgment on award, 131.

Subd. 2. Appeal, 133.

§ 2381. *Appeal*, 133.

§ 2378. Judgment on award; when and how entered. Costs.

Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

§ 2379. Judgment roll.

Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such an application.

4. A copy of the judgment.

The judgment may be docketed, as if it was rendered in an action.

§ 2380. Effect of judgment; how enforced.

The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

Subd. 1. Judgment on Award.

It was held in *Hughes v. Bywater*, 4 Hill, 551, that where a bond of submission to arbitrators contained a stipulation that in case the award was not paid or fulfilled judgment for the penalty of the bond might be forthwith entered in the Supreme Court, the prevailing party was at liberty to perfect judgment immediately; but this is questioned in *Goodsell v. Phillips*, 49 Barb. 353. As to the entry of judgment on an award under arbitration not under the statute, see *Bank of Monroe v. Widner*, 11 Paige, 529; *Merritt v. Thompson*, 27 N. Y. 225.

The fact that the court has confirmed an award presents no obstacle to enjoining proceedings under it, if the award was of a matter which is not the subject of arbitration. *Wyatt v. Benson*, 23 Barb. 327. An action upon an award on a submission under the statute may be brought in the Supreme Court, although the submission provides for judgment in the County Court. If defendant desires to move that court for relief he may obtain a stay of proceedings. The statute is cumulative merely, not exclusive, and the right of action on the award still remains. *Burnside v. Whitney*, 21 N. Y. 148.

It was held under the statute that on reviewing an order refusing to vacate an award and giving judgment thereon, the appellate court will not consider questions not raised in the court below. *Hollenbeck v. Fleming*, 6 Hill, 303. Also that the party aggrieved could, on appeal, review only the errors specifically pointed out by statute. *Dibble v. Camp*, 60 Barb. 150; *Ketcham v. Woodruff*, 24 Barb. 147; *Wilson v. Wilson*, 66 Barb. 209.

Where plaintiff deposits a sum of money in a bank sufficient to pay a claim if it is established before arbitrators, and an award made to the defendant is set aside by the court, the judgment properly enjoins the defendant from drawing on the bank. *Cullen v. Shipway*, 177 N. Y. 571, aff'g judgment, 78 App. Div. 130, 79 Supp. 627.

Statutory arbitrations are special proceedings and an attorney-at-law rendering services to one of the parties is entitled to a lien under section 66 of the Code of Civil Procedure. But where the

parties to such arbitration agree without the consent of such attorney that the awards shall be set off, and the result of an offset will defeat the attorney's lien by preventing the entry of any judgment in his client's favor his lien is superior to the parties' right to set off, for by virtue of the statute such lien cannot be affected by any settlement between the parties before or after judgment. Hence, to preserve such lien the court will permit a judgment to be entered upon the client's award for the amount due the attorney and limit the set-off agreed upon by the parties to the balance of the client's award. *Webb v. Parker*, 130 App. Div. 92, 114 Supp. 489.

Since the amendment to section 66 of the Code of Civil Procedure, made by chapter 542 of the Laws of 1879, an attorney need not give notice of his lien and any party settling without the knowledge of the attorney does so at his peril. Even though a judgment in favor of the client is entered to protect her attorney's lien, he must first resort to the client for payment, the judgment meanwhile standing as security, and he cannot resort to it until he has exhausted his remedy against the client, or has shown that she is insolvent and that it will be futile to pursue the claim. *Webb v. Parker*, 130 App. Div. 92, 114 Supp. 489.

(Title.) **Precedent for Judgment (169 N. Y. 494).**

The matters in difference between the above-named Charlotte L. Wilkins and Walter S. Allen, as administrator of Lorena Allen, deceased, having been duly submitted to Hamilton Odell, as arbitrator, by a submission in writing, executed by the said parties, dated on the 14th day of February, 1898, and filed in the office of the Clerk of the County of New York on the 8th day of December, 1898, as by reference thereto will fully appear, and the said arbitrator having been first duly sworn, as prescribed by section 2369 of the Code of Civil Procedure, and having heard the proofs and allegations of the said parties and duly considered the same, and having made an award dated and acknowledged on the 16th day of November, 1898, and filed in the office of the Clerk of the County of New York on the 8th day of December, 1898, and thereafter and on the 8th day of February, 1899, an order of this court having been made, confirming said award and directing judgment thereon in accordance with the statute, on motion of Parsons, Shepard & Ogden, attorneys for Charlotte L. Wilkins, it is adjudged:

(Here follows determination of questions submitted.)

Dated, New York, February 17, 1889.

WILLIAM SOHMER,
Clerk.

(Usual indorsement and notice of judgment.)

(Title.) **Precedent for Judgment (191 N. Y. 437).**

A dispute having arisen between the parties above-named in regard to divers matters pending between them, and the said dispute and differences having been submitted to Hon. D. Cady Herrick as arbitrator,

agreed upon between the parties, and the said arbitrator having duly made an award dated the 1st day of August, 1906, and filed in the office of the County Clerk of New York County on the 2d day of August, 1906, wherein the said arbitrator awarded and decided that the said Luke A. Burke was entitled to recover against the said Henry Corn the sum of fifty-three thousand three hundred and fifty-seven and ninety-two one-hundredths dollars (\$53,357.92), of which said sum the sum of forty-seven thousand two hundred and eighteen and fifty-five one-hundredth dollars (\$47,218.55), was paid by the said Corn to the said Burke on the 29th day of August, 1906, leaving still due and owing on account of said award from said Corn to said Burke, including interest to the said 29th day of August, 1906, the sum of six thousand one hundred and thirty-nine and thirty-seven one-hundredth dollars (\$6,139.37), and the said award having been duly confirmed by an order of this court dated the 26th day of September, 1906, and it appearing that the said Luke A. Burke is entitled to judgment against the said Henry Corn for the sum of six thousand one hundred and thirty-nine and thirty-seven one-hundredth dollars (\$6,139.37), with interest from the 29th day of August, 1906, amounting to the sum of six thousand one hundred and seventy-eight and twenty-five one-hundredth dollars (\$6,178.25.)

Now, on motion of Eidlitz & Hulse, attorneys for Luke A. Burke, it is adjudged, that the said Luke A. Burke recover of said Henry Corn the sum of six thousand one hundred and seventy-eight and twenty-five one-hundredth dollars (\$6,178.25), damages, and that he have execution therefor.

PETER J. DOOLING,
Clerk.

Dated, October 9, 1906.

Subd. 2. Appeal. § 2381.

§ 2381. Appeal.

An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

No appeal lies from an order confirming an award made in a statutory arbitration. By virtue of section 2381 of the Code of Civil Procedure an appeal lies only from an order vacating an award or from a judgment entered upon the award. Where, however, a party has appealed both from an order confirming an award and from the judgment entered thereon, the appeal from the former may be disregarded. The proper practice for a party wishing to vacate, modify or correct an award made on a statutory arbitration is to make an independent motion for relief, but a failure to do so does not deprive him of his right to raise objections upon the motion to confirm the report and to review the judgment upon the same ground. But the objections which may be so taken are only those which might have been taken by an independent motion to vacate, correct or modify. *Matter of Picker*, 130 App. Div. 88, 114 Supp. 289, 1 Civ. Pro. 132.

An appeal, pursuant to section 2381, from a judgment entered upon the award of an arbitrator to whom questions of law were submitted under an agreed statement of facts, presents for review only such questions as have been raised by a motion under sections 2374 and 2375, and where no such application has been made in the case the award cannot be reviewed. *Matter of Wilkins*, 169 N. Y. 494, aff'g 48 App. Div. 433.

If the award has been confirmed, the appellant may contend that it ought to have been vacated, modified or corrected upon some or all of the grounds set out respectively in sections 2374 and 2375 of the Code of Civil Procedure, so far as the record on appeal discloses the existence of such grounds. If it has been modified or corrected upon any or all of the grounds mentioned in section 2375 he may insist that it should have been confirmed *in toto* or not modified and corrected to the extent ordered in the court below. *Matter of Wilkins*, 48 App. Div. 433 (438); aff'd, 169 N. Y. 494.

Appeals are allowed (1) from an order vacating an award, and (2) from a judgment entered upon an award. No judgment is entered upon an order vacating an award. If a court at a Special Term determines that an award should be vacated, an order is entered upon that determination from which an appeal may be taken under section 2381. But if an order of the Special Term confirms or modifies or corrects an award, judgment is to be entered thereon (section 2378), and from that judgment, not from the order, the aggrieved party is entitled to appeal. *Matter of Wilkins*, 48 App. Div. 433 (438); aff'd, 169 N. Y. 494.

Where a report of arbitrators has been confirmed the appeal should be taken from the judgment entered on the award, not from the order confirming the report. One appealing from a judgment entered upon an award of arbitrators must file a case and exceptions showing the proceedings before the arbitrators if he desire to contest the propriety of the award. If he desire to review the order confirming the award it must be specified in the notice of appeal. *Matter of Gitt*, 138 App. Div. 147, 123 Supp. 304.

An appeal from an order confirming the report of arbitrators, and from the judgment entered thereon, must be heard upon the same papers as were before the court at the time when the order was made and the judgment directed from which the appeal is taken. A case forms no part of these papers, and none can regularly be proposed or served in any proceeding taken to make or review an application concerning an award. *Matter of Poole v. Johnston*, 32 Hun, 215.

ARTICLE VII.

REVOCATION OF AWARD, OR DEATH OF PARTY. §§ 2382-2385.

- § 2382. *Effect of party's death, lunacy, etc., proceedings thereupon*, 135.
 § 2383. *Revocation of submission*, 135.
 § 2384. *Liability of party who revokes*, 135.
 § 2385. *Limitation of recovery against him*, 135.

§ 2382. *Effect of party's death, lunacy, etc., proceedings thereupon.*

The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterwards. Where a party dies afterwards, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property, but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

§ 2383. *Revocation of submission.*

A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side.

§ 2384. *Liability of party who revokes.*

Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses.

§ 2385. *Limitation of recovery against him.*

A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

Section 2383 is intended, as is said by the revisers, to abolish the rule laid down in *Van Antwerp v. Stewart*, 8 Johns. 125, and in *Robertson v. McNeil*, 12 Wend. 578; also to settle a conflict of authority in *Bloomer v. Sherman*, 5 Paige, 575; *Bank of Monroe v. Widner*, 11 Paige, 529, and *French v. New*, 20 Barb. 481, in accordance with the two former decisions. A revocation on condition is none the less a revocation, if effectual to take away the arbitrator's right to proceed. *Crofoot v. Allen*, 2 Wend. 494.

Both in common-law arbitrations and in statutory arbitrations, by virtue of section 2383, parties to an arbitration may terminate the same, and after such revocation the court has no authority to establish or maintain the submission, for it is as much out of existence as though no agreement had been made at any time providing for it. It follows that all parties are restored and remitted to the rights against each other which they had previous to the making of the agreement to submit, and these rights may be enforced by action. Where such arbitration has been terminated by revocation, equity will not restrain actions on the ground that a compromise was made. *Schepp v. Manly*, 59 Hun, 440, 36 St. Rep. 994, 13 Supp. 730.

The manner prescribed in section 2383 for revoking a submission to arbitration applies to common law as well as to statutory arbitrations, and an arbitration cannot be revoked by the commencement of an action; it must be made by an instrument in writing signed by the revoking party or his authorized agent and delivered to the arbitrators. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 32, 1 Supp. 442, 119 N. Y. 478.

Arbitrators obtain their power merely by the continuing consent of the parties, and if an agreement to arbitrate, while yet executory, is broken by either party the power of the arbitrators ceases. This is true both as to common-law arbitrations and as to arbitrations under the Code, and the submission may be revoked by any party at any time before the matter has been finally submitted to the arbitrators; and this is so, even though the submission to arbitration provides against any revocation, and although the party seeking to revoke expressly waived and abandoned his right to revoke for a valuable consideration. This, on the ground that such stipulations like other executory agreements, if broken, simply leave to the other party an action for damages. *People ex rel. Union Insur. Co. v. Nash*, 111 N. Y. 310, 19 St. Rep. 75.

An agreement that arbitrators shall be appointed in case controversy arises between the party to the agreement, or an agreement

to arbitrate a pending controversy, is subject to revocation at any time before the final submission to the arbitrators for their decision. *Finucane v. Board of Education*, 190 N. Y. 76, citing *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310.

A letter by one of the parties to arbitration to another, in which he complained of the arbitrator having improperly considered certain questions, though expressing willingness to accept the award except as to certain items, is not a repudiation of the arbitration. *Stinesville & Bloomington Stone Co. v. White*, 32 Misc. 135, 65 Supp. 609, rev'g judgment, 25 Misc. 314, 54 Supp. 577.

Neither the right nor the remedy of the party aggrieved by the revocation of the submission to arbitration given by section 2384 is exclusive. *Magoun v. Magoun*, 84 App. Div. 232, 82 Supp. 820.

The provisions of the Code do not place a limitation upon the right of action at common law to recover damages for revocation of a submission, except by limiting the amount of the recovery. They create no new or exclusive remedy but confirm the old one and fix a measure of damages. *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 29 Civ. Pro. 2.

Defendant, as administrator, having agreed with plaintiff to submit differences between them to the final decision of an arbitrator revoked the submission without cause; *held*, that plaintiff was entitled to maintain an action for her damages arising from defendant's breach of the agreement, and under Code of Civil Procedure, section 1815, could sue him both individually and as executor, it being uncertain in which capacity he was liable. *Magoun v. Magoun*, 84 App. Div. 232, 82 Supp. 820.

If a party to an arbitration revoke the same, he is chargeable upon an action by the other party with all costs and other expenses incurred by the latter in preparing for the arbitration. *Union Ins. Co. v. Central Ins. Co.*, 24 Civ. Pro. 220, 66 St. Rep. 300, 32 Supp. 838, 87 Hun, 143. Where one party to an arbitration revokes the same, that party revoking and any sureties upon an undertaking collateral to the submission are liable in an action for all costs and other expenses, and for all damages incurred in preparing for the arbitration and in conducting the proceedings up to the time of revocation, notwithstanding the fact that the agreement for arbitration provided that the expenses should be borne proportionately by the parties and that no part of the costs should be recovered by the prevailing party or parties or be entered in the judgment. So *held* because the revocation of the submission destroyed the stipulation

and left section 2384 in force. *Union Ins. Co. v. Central Trust Co.*, 87 Hun, 140, 36 Supp. 439, 32 Supp. 838, 24 Civ. Pro. 220. See s. c., 13 Supp. 18; aff'd, 157 N. Y. 633, 29 Civ. Pro. 2. See *Harris v. Hiscock*, 91 N. Y. 340, rev'g 14 Week. Dig. 219, as to effect of death of one of parties and of arbitrators.

An arbitration under an appraisal clause in a lease is not revocable like a common-law or statutory arbitration. Neither party to an arbitration has the power to withdraw after the allegations and proofs have been made and the matter has been finally submitted to the arbitrators. Nor will the withdrawal of one of the arbitrators in such a case and his refusal to act after one of the parties has attempted to withdraw affect the validity of an award made the same day by the other arbitrators where the lease permits a majority decision. *Atterbury v. Trustees of Columbia College*, 66 Misc. 273, 123 Supp. 25.

After the briefs have been made on both sides and the matter finally submitted the submission cannot be revoked on the ground of irregularities in the proceeding, such as failure to compel the production of documents, appearance of counsel as witness, and failure to swear witnesses. *Briton v. Hooper*, 25 Misc. 388, 55 Supp. 493.

There is no doubt that at common law a submission to arbitration was revocable at any time before the award was actually made. *Bank of Monroe v. Widner*, 11 Paige, 529, 534; *Allen v. Watson*, 16 Johns. 205. But such revocation is not now available to a party after "the proofs of the parties have been closed and the matter finally submitted to the arbitrators for their decision." *Code*, § 2383; *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310; *Pizzini v. Hutchins*, 70 Misc. 94.

ASSESSMENT, HOW REVIEWED.

See TAX LAW, CERTIORARI TO REVIEW ASSESSMENT.

ATTORNEYS AND COUNSELLORS.

ARTICLE.

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- Code, § 59, to Judiciary Law, §§ 264, 466.
- Code, § 66, to Judiciary Law, §§ 474, 475.
- Code, § 67, to Judiciary Law, §§ 88, 477.
- Code, § 68, to Judiciary Law, §§ 88, 476.
- Code, § 69, to Judiciary Law, § 478.
- Code, § 193, to Judiciary Law, § 51, 53.

The former Code provisions, sections 56 to 81, relative to attorneys and counselors-at-law have, with the exception of part of sections 60 and 65, been transferred by the Commissioners of Statutory Consolidation to the Judiciary and Penal Laws. Those portions of the statutes on this subject which are here collated are given as found in those Laws. The preceding table refers to their former section numbers in the Code. The provisions of the Judiciary Law on the subject are found in sections 53, 56, and 88 and under article 15, entitled "Attorneys and Counsellors," sections 460 to 479. In the Penal Law, sections 270 to 280.

The lien of an attorney upon a cause of action may be enforced either by special proceeding under section 475 of the Judiciary Law (former section 66 of the Code) or by action in the nature of a suit in equity, where it is sought to enforce the lien against defendant in addition to the method in vogue previous to 1899 by obtaining leave to continue the action.

While it is not the purpose of this work to treat procedure except by way of special proceedings, the peculiar situation with reference to attorney's liens by which they may, in certain cases, be enforced by a special proceeding and in others by action, and in certain cases by either special proceedings or actions renders it desirable to consider the entire subject, including to some extent the rights and liabilities of attorneys generally, as the authorities bearing upon the

rights of the attorney cover both methods of procedure, and for that reason the action in equity as a means of enforcing the attorney's lien is necessarily considered, although "Actions" are outside the scope of the work.

ARTICLE I.

EXAMINATION, ADMISSION AND REGISTRATION OF ATTORNEYS.

JUDICIARY LAW. §§ 53 (in part), 56, 88 (in part), 460-466, 468, 469.

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§ 468. *Registration of attorneys before beginning to practice, 155.*

§ 469. *Official register of attorneys to be kept by clerk of Court of Appeals 155.*

Subd. 1. Provisions, Judiciary Law, §§ 56, 88 (in part), 460-465.

§ 460. Examination and admission of attorneys.

A citizen of the state, of full age, applying to be admitted to practice as an attorney or counsellor in the courts of record of the state, must be examined and licensed to practice as prescribed in this chapter. (Code Civ. Pro., § 56.)

§ 461. State board of law examiners continued.

The state board of law examiners is continued. Said board shall consist of three members of the bar, of at least ten years' standing, who shall be appointed, from time to time, by the court of appeals, and shall hold office, as a member of such board for a term of three years, and until the appointment of his successor. (Code Civ. Pro., § 56.)

§ 56. Appointment and compensation of state board of law examiners.

The members of the state board of law examiners shall be appointed from time to time, by the court of appeals, as provided in section four hundred and sixty-one of this chapter. The court of appeals shall fix the compensation of the members of the said board. (Code Civ. Pro., § 56.)

§ 462. Times and places of examinations.

There shall be examinations of all persons applying for admission to practice as attorneys and counsellors-at-law at least twice in each year in each judicial department, and at such other times and places as the court of appeals may direct. (Code Civ. Pro., § 56.)

§ 463. Certification by state board of successful candidates.

The state board of law examiners shall certify to the appellate division of the supreme court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counsellors, which fact shall be determined by said board before examination. (Code Civ. Pro., § 56.)

§ 464. Annual account by state board of law examiners.

The state board of law examiners shall render during the month of January, an annual account of all their receipts and disbursements to the court of appeals. (Code Civ. Pro., § 56.)

§ 465. Fee for examinations.

Every person applying for examination for admission to practice as an attorney and counsellor-at-law shall pay such fee, not to exceed fifteen dollars, as may be fixed by the court of appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations. (Code Civ. Pro., § 56.)

§ 88 (in part). Admission to and removal from practice by appellate division.

1. Upon the certificate of the state board of law examiners, that a person has passed the required examination, if the appellate division of the supreme court in the department in which such person lives shall find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counsellor in all courts of the state. (Code Civ. Pro., § 56.)

For a considerable period after the adoption of the Constitution of 1846, the matter of admission to the bar was entirely in the hands of the General Terms in the respective districts and departments. The Court of Appeals, however, several years ago, in deference to the sentiment of the bar upon the subject, adopted a set of rules regulating the matter of admissions and prescribing certain preliminary qualifications. These rules have been amended from time to time, and, as now numbered and arranged, were adopted so as to take effect July 1, 1911.

The amendment to section 56 of the Code by chapter 760 of the Laws of 1894 provided for a stated number of law examiners. The substance of that enactment is contained in the Judiciary Law. This board entered upon its duties on the 1st of January, 1896, and its action is controlled by such provisions of the Code as relate to the admission of attorneys by the rules of the Court of Appeals upon that subject, together with a single rule of the Supreme Court and by rules adopted by the Board of Law Examiners for their own guidance.

The preliminary requirements as fixed and determined by the Board of Regents for those other than graduates of colleges, recognized by such board, are very full, minute, and explicit, and are furnished by the board upon application.

In order to call the attention of the student, as well as the practitioner, to the requirements for entering upon and prosecuting the study of the law, the statutes and the rules of the Court of Appeals, of the Supreme Court, and of the State Board of Examiners are here inserted for convenience of reference, since in very many instances it is found that practitioners and students alike neglect preliminary requirements, and it is very frequently, only after a considerable period of time spent in the study of the law, that a student discovers that he has omitted some of the matters necessary to entitle him to apply for admission.

The power of the court to admit or to remove attorneys is given by statute, and in either case the proceeding is a special one. *In re Percy*, 36 N. Y. 651; *In the Matter of an Attorney*, 83 N. Y. 164.

The Constitution gives to every qualified applicant for admission to the bar the right to admission, which is a substantial right. His application is a special proceeding and an order denying the right of admission is appealable to the Court of Appeals. *Matter of the Application of Cooper*, 22 N. Y. 67. More fully as *Matter of Graduates*, 11 Abb. 301. This case contains an interesting discussion of the power of the courts with respect to the admission of attorneys. At common law, the courts had nothing to do with the admission of attorneys and counsellors to practice; the power is conferred by the Constitution.

A citizen of another State is not entitled, as matter of right, to admission to the bar of this State as attorney and counsellor-at-law.

The word citizen "in the section of the State Constitution providing that any male citizen of the age of twenty-one years," of proper qualifications, "shall be entitled to admission to practice in all the courts of this State" (art. 6, § 8), is to be construed as meaning *citizens of this State*. *In Matter of Henry*, 40 N. Y. 560.

An alien may not be admitted to practice as an attorney and counsellor-at-law in this State. The provision of the rule of the Court of Appeals (rule 7, as amended in 1880), authorizing the admission of persons who have practiced three years in the highest courts of law of another country, applies only to the case of a citizen of the United States who has thus practiced. It seems that the Legislature has power under the Constitution to authorize the admission of persons not citizens of the State (art. 6, as amended in 1871). *In the Matter of O'Neill*, 90 N. Y. 584.

The petitioner was admitted to the practice of law in New Jersey, but in less than a year he began a clerkship in New York. It was not shown that he possessed the necessary educational qualification

for admission to practice in this State; *held*, that he was not entitled to be admitted to examination for admission to the bar under rule 4, which provides that persons admitted to practice in another State, and who have practiced there for one year, may be admitted to examination in this State, since he did not remain in New Jersey for one year after his admission. *Matter of Simpson*, 167 N. Y. 403.

In this State counsellors, solicitors, and attorneys have ever been appointed or admitted to practice by the several courts in which they intend to pursue their profession, and although they are declared by statute to be judicial officers yet they do not hold an office or public trust in the constitutional sense of that term. They are officers of the court, exercising a privilege or franchise subject to removal or suspension by the courts, but if they are not so removed or suspended they hold their office for life. *Matter of Baum*, 30 St. Rep. 174.

On account of the difference in the systems of jurisprudence in Italy and New York State, it is inadvisable to permit a naturalized citizen of this country to practice law in this State because of his having been an attorney in good standing in Italy. *Matter of Maggio*, 27 App. Div. 129, 51 Supp. 1055.

The rules for admission to the bar do not require a law school to certify to the State Board of Law Examiners that its students have been "graduated" or have "received a degree" in order that they may be admitted to examination, it being sufficient for the certificate to state that the student has "successfully completed the prescribed course of instruction" during the periods named.

It is sufficient for a law student, whose attendance at a law school had already begun when the present rules went into effect, to show full compliance with the rules adopted December 2, 1895, without showing compliance with the rules which went into effect July 1, 1907, but the proofs submitted, as to time of study, etc., must be satisfactory to the State Board of Law Examiners.

Under subdivision 1 of rule 5 a law school may properly grant a certificate of "part time" for less than a year, but the applicant should be credited only with the time actually spent in the law school, to the same extent and no more, as if the time spent had been in a law office, and the proofs must show to the satisfaction of the State Board of Law Examiners that the applicant has successfully pursued the prescribed course of instruction during that time. *Matter of New York Law School*, 190 N. Y. 215. (The reference to the Rules is to those superseded in 1911.)

Subd. 2. Rules Court of Appeals; Rule I Supreme Court; § 53 (in part) Judiciary Law.

§ 53. (in part). Power of court of appeals as to admission of attorneys and counsellors.

1. The court of appeals may from time to time make, alter and amend, rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counsellor at law, to practice in all the courts of record of the state. (Code Civ. Pro., § 193.)

2. The court may make such provisions as it shall deem proper for admission to practice as attorneys and counsellors, of persons who have been admitted to practice in other states or countries. (Code Civ. Pro., § 56.)

3. The court shall prescribe rules providing for a uniform system of examination of candidates for admission to practice as attorneys and counsellors, which shall govern the state board of law examiners in the performance of its duties. (Code Civ. Pro., § 56.)

Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law.

(As Amended May 17, 1911.)

RULE I.

GENERAL REGULATION AS TO ADMISSION.

No person shall be admitted to practice as an attorney or counsellor in any court of record of the State except upon an order of the Appellate Division of the Supreme Court admitting him to the bar and licensing him to practice upon compliance with these rules.

RULE II.

ADMISSION WITHOUT EXAMINATION.

The following classes of persons may in the discretion of the Appellate Division be admitted and licensed without examination:

1. Any person admitted to practice and who has practiced five years as a member of the bar in the highest law court in any other State or Territory of the American Union or in the District of Columbia.

2. Any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law.

3. Any American citizen domiciled in a foreign country whose jurisprudence is based on the principles of the English common law holding a diploma or degree which would entitle him to practice law in the courts of such foreign country if a citizen thereof.

Any person admitted under this rule must possess the other qualifications required by these rules and must produce a letter of recommendation from one of the judges of the highest law court of such other State or country, or furnish other satisfactory evidence of character and qualifications.

An attorney and counsellor from another State or foreign jurisdiction may in the discretion of any court of record be admitted *pro hac vice* to participate in the trial or argument of any case in which he may be employed.

RULE III.

ADMISSION ON EXAMINATION.

Three classes of persons may be admitted to the bar upon examination:

1. Persons who are not graduates of a college or university;
2. Persons who are graduates of a college or university; and
3. Persons who have been admitted as attorneys and have practiced three years in another state or country.

In each class the applicant must prove by his own affidavit to the satisfaction of the State Board of Law Examiners that he is a citizen of the United States, twenty-one years of age, stating his age, and an actual and not a constructive residents of the State for not less than six months immediately preceding and that he has not been examined for admission to practice and been refused admission within four months, and that he has studied law in the manner and according to the conditions in these rules prescribed.

Applicants in the first class (*i. e.*, persons who are not graduates of a college or university) must have studied law for a period of four years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or partly by serving such clerkship and partly by attending a law school; but every such applicant must serve such clerkship for a period of at least one year continuously either before examination by the State Board of Law Eximiners or after such examination and prior to admission to the bar.

Applicants in the second class (*i. e.*) persons who are graduates of a college or university) must have studied law for a period of three years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or wholly by attending a law school; or partly by serving such clerkship and partly by attending a law school.

Applicants in the third class (*i. e.*, persons who have been admitted as attorneys and have practiced three years in another State or country) must have studied law for a period of one year within this State and pursue such course of study either by serving a clerkship or by attendance upon a law school as the applicant may elect.

Candidates for admission to the bar under this rule (*i. e.*, upon examination) may be admitted and licensed upon producing and filing with the court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions, and upon producing and filing with the court, in the case of applicants in the first class (*i. e.*, persons who are not graduates of a college or university), evidence that he has served a regular clerkship of one year in this State with an attorney or attorneys in regular practice, either before or after having passed such examination. The applicant must also produce and file evidence that he is a person of good moral character, which must be shown by the affidavits of two reputable persons of the town or city in which he resides, one of whom must be a practicing attorney of the Supreme Court. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character, and must set forth in detail the facts upon which such knowledge is based; but such affidavits shall not be conclusive and the court may make further examination and inquiry.

If the applicant be a graduate of a college, or university, he must have pursued the prescribed course of law study after his graduation, and, if he be a person admitted to the bar of another State or country, he must have pursued his prescribed period of law study after having remained as a practicing attorney in such other state or country for the period of three years.

RULE IV.

REGULATIONS CONCERNING PRELIMINARY STUDIES.

All candidates for admission to the bar upon examination, except applicants in the third class mentioned in Rule III (*i. e.*, persons who have been admitted and have practiced three years in another State or country), must have pursued a preliminary course of study evidenced by graduation from a college or university, or by passing a Regent's examination or the equivalent, as hereinafter prescribed:

Applicants who are not graduates of a college, or university, subject to the limitations and requirements hereinafter, in this subdivision, expressed, or members of the bar as above described, before entering upon the clerkship or attendance at a law school herein prescribed shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact, signed by the Commissioner of Education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate, properly authenticated, of having successfully completed a full year's course of study in any college, or university; second, a certificate, properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma.

All graduates of a college or university existing under the government or laws of any foreign country other than those where English is the language of the people, and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries, shall pass the Regent's examination in second year English. The Regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

RULE V.

REGULATIONS CONCERNING STUDY AT LAW SCHOOLS.

The provisions of these rules for study at a law school must be fulfilled by good and regular attendance and successfully completing the prescribed course of instruction at an incorporated law school, or a law school connected with an incorporated college or university, having a law department organized with competent instructors and professors, in which instruction as hereinafter provided is regularly given.

Good and regular attendance upon and the successful completion of the prescribed course of instruction at a law school, the school year of which shall consist of not less than thirty-two school weeks, exclusive of vacations, in which not less than ten hours of attendance upon law lectures or recitations of such prescribed course, to be given or conducted by regular members of the faculty, are required in each week, shall be deemed a year's attendance under this rule.

The same period of time shall not be duplicated for different purposes; except that a student attending a law school, as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

RULE VI.

REGULATIONS CONCERNING CLERKSHIP.

The provisions of these rules for studying law by the service of a regular clerkship must be fulfilled by serving such clerkship in the office of a practicing attorney of the Supreme Court in this State, after the candidate has attained the age of eighteen years.

It shall be the duty of attorneys, with whom a clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year.

In computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as a part of such year.

RULE VII.

PROOF TO ENTITLE CANDIDATE TO EXAMINATION.

The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

First. That the applicant is a college graduate, by the production of his diploma, or certificate of graduation, under the seal of the college.

Second. That he has been admitted to the bar of another state or country, by the production of his license, or certificate, executed by the proper authorities.

Third. In all cases where the service of a clerkship is required, that he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, by producing and filing with the Board a certified copy of the attorney's certificate, as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year. Both of said affidavits must be to the effect that during the entire period of such clerkship, except during the stated vacation time, the applicant was actually employed by said attorney as a regular law clerk and student in his law office, and under his direction and advice, engaged in the practical work of the office during the usual business hours of the day.

Fourth. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must, also, state the age at which the applicant began his attendance at such law school. Said certificate and affidavit must, also, show that the law school prescribes the course of instruction contemplated by these rules, and each shall also contain the statement that said applicant took the prescribed course of instruction required at said school for the degree of Bachelor of Laws while in attendance thereat, and bona fide took and successfully passed all examinations in all the subjects required for said degree during such period of attendance, in each case specifying the subjects in which said applicant took and passed his examinations as aforesaid, which proof must be satisfactory to the Board of Examiners.

Fifth. That the applicant has passed the Regents' examination, or its equivalent, must be proved by the production of a certified copy of the Regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

Sixth. When it satisfactorily appears that any diploma, affidavit, or certificate, required to be produced has been lost, or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

Seventh. A law student whose clerkship, or attendance at a law school, has already begun, as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his option, file or produce, instead of the proofs required by these rules, those required by the Rules of the Court of Appeals in force June 1, 1908.

RULE VIII.

REGULATIONS CONCERNING EXAMINATION.

The examination held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral or partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. Every applicant shall be given and required to pass a satisfactory examination in the canons of ethics adopted by the American Bar Association and by the New York State Bar Association. An applicant who has failed to pass one examination cannot again be examined, until at least four months after such failure.

The State Board of Law Examiners shall be paid as compensation, each, the sum of two thousand dollars per year, and, in addition, such further sum as the court may direct and an annual sum not exceeding two thousand dollars per year shall be allowed for necessary disbursements of the Board. Every applicant for examination shall pay to the examiners a fee of fifteen dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State Board of Law Examiners and deposited in some bank, in good standing, in the city of Albany, to his credit and subject to his draft as such treasurer, when approved by the Chief Judge.

RULE IX.

RELIEF FROM EXCUSABLE MISTAKES.

When the filing of a certificate, as required by these rules, has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date.

RULE X.

ADDITIONAL RULES BY THE APPELLATE DIVISION.

The Justices of the Appellate Division in each department may adopt for their several and respective departments such additional special rules for ascertaining the moral and general fitness of applicants as to such Justices may seem proper.

These rules shall take effect on July 1, 1911.

Rule I (Supreme Court).

APPLICATION FOR ADMISSION AS ATTORNEYS.

Within ten days after the first day of January in each year, the Appellate Division in each Department shall appoint a Committee on Character and Fitness of not less than three for the Department, or may appoint a Committee for each Judicial District within the Department, to whom shall be referred all applications for admission to practice as attorney and counsellor-at-law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the State Board of Law Examiners, or upon motion under Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counsellors-at-law. The committee shall require the attendance before it, or a member thereof, of each applicant, with the affidavit of at least two practicing attorneys acquainted with such applicant, residing in the Judicial District in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based; and it shall be the duty of the committee to examine each applicant, and the committee must

be satisfied from such examination and other evidence that the applicant shall produce that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect, unless the court otherwise orders.

No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the Bar and qualifies him to perform the duties of an attorney and counsellor-at-law.

An applicant for admission to practice as an attorney and counsellor-at-law on motion, under the provisions of Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counsellors-at-law, must present to the court proof that he has been admitted to practice as an attorney and counsellor-at-law in the highest court of law in another state, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities, that he has been duly admitted to practice in such state or country; that he has actually remained in said state or country, and practiced in such court as attorney and counsellor-at-law for the last three years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practiced as an attorney and counsellor-at-law for a period of at least three years after he has been admitted, specifying the name of the place or places in which he had so practiced, and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the State of New York, or of an adjoining state, for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are resident of the Judicial District in which he resides, one of whom must be an attorney and counsellor-at-law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person before the court on the motion for his admission, and also before the committee on character and fitness for the district in which the application is made. When the applicant resides in an adjoining state, and a motion is made to admit him to practice in this state without actual residence herein in addition to the foregoing facts the applicant must prove to the satisfaction of the court that he has opened and maintains an office in this state for the transaction of law business therein.

In all cases the applicant for admission must file with the clerk of the Appellate Division of the proper Department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice.

The rules of court being made under special statutory authority have the force and effect of statutes. While a failure to comply with a rule, which is merely directory in its provisions, may be obviated by allowing the act required to be performed to be done *nunc pro tunc*, this is not so with reference to mandatory provisions.

This court will not, therefore, by allowing the Regents' certificate to be filed *nunc pro tunc*, exempt an applicant for admission as an attorney from the obligations of its rules (subd. 3 of rule 4 relating to admission of attorneys), requiring proof that the applicant had before, or within three months after the commencement of his clerkship, passed the prescribed Regents' examination. *Matter of Moore*, 108 N. Y. 280, followed *Matter of Mason*, 140 N. Y. 658. See *Matter of Klein*, 155 N. Y. 696.

Subd. 3. Rules of the New York State Board of Law Examiners.

Rules of the New York State Board of Law Examiners.

(As Amended, to Take Effect on July 1, 1911.)

RULE I.

Each applicant for examination must file with the Secretary of the Board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the "Rules of the Court of Appeals for the admission of attorneys and counsellors-at-law," from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for six months prior to the date of the said examination, giving place, with street and number, if any which must be made by his own affidavit. Said affidavit must also state that such residence is actual and not constructive. The Board in its discretion may order additional proofs of residence to be filed, and may require an applicant to appear in person before it, or some member thereof, and be examined concerning his qualifications to be admitted to the examinations. The examination fee of \$15 must be paid to the Treasurer at the time the application for examination is filed.

To entitle an applicant to a re-examination, he must notify the Secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear and file with him, at the same time, his own affidavit stating that he is and has been for the six months prior to such examination an actual and not constructive resident of this State, giving the place of such residence, and street and number, if any.

RULE II.

Each applicant must be a citizen of the State, of full age; he may be examined in any Department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the Appellate Division of the Judicial Department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the Department in which he resides.

Note.—An Applicant must appear for examination in the Department in which he entitles his papers, unless permission of the Board otherwise be granted at least fifteen days before the day appointed for holding the examination.

RULE III.

In applying the provisions of Rules III and VII of the Rules of the Court of Appeals, "For the admission of attorneys and counsellors-at-law," the Board will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of studies completed by him. In case the college or university is registered with

the Board of Regents of the State of New York as maintaining such standard, the applicant must submit to the Board, with his diploma or certificate of graduation, the certificate of the said Board of Regents to that effect, which will be accepted by this Board as *prima facie* evidence of the fact. Such certificate need not be filed in cases where the Board of Regents, by a general certificate, has certified to this Board that the said college or university maintains a satisfactory college standard leading to the degree with which the applicant graduated. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

RULE IV.

The papers filed by each applicant must be attached together, and there must be endorsed upon them the name of the applicant. The papers must be entitled, "In the matter of the application of for admission to the Bar." Each applicant must state the beginning and the end of each term spent in a law school, his age when he began his attendance upon the law school, as well as the beginning and the end of each vacation that he has had.

RULE V.

An applicant who has been admitted to the bar as an attorney in another State or country, and who has remained therein as a practicing attorney for the period of three years, may prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted, or from a county judge in said State, certifying that the applicant had remained in said State or country as a practicing attorney for said period of three years, after he had been admitted as an attorney therein. The signature of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court.

RULE VI.

The Board will divide the subjects of examination into two groups, as follows: Group One, Pleading and Practice and Evidence; Group Two, Substantive Law, viz.: Real Property, Contracts, Partnership, Negotiable Paper, Principal and Agent, Principal and Surety, Insurance, Bailments, Sales, Criminal Law, Torts, Wills and Administration, Equity, Corporations, Domestic Relations, Legal Ethics and the Constitutions of New York State and of the United States. Each applicant will be required to obtain the requisite standard in both groups and on his entire paper to entitle him to a certificate from the Board. If he obtains the required standard in either group and not on his entire paper he will receive a pass card for the group which he passes and will not be required to be re-examined therein. He will be re-examined in the group in which he failed or on the entire paper if he failed in both groups at any subsequent examination for which he is eligible and for which he gives notice as required by these rules.

Note.—Applicants should file their papers at the earliest possible moment; amendable defects may be discovered, which can be corrected if attended to promptly.

Subd. 4. Requirements of Regents.

(See Regents' Hand Books, Nos. 3 and 27.)

Sixty count qualifying certificates. All candidates taking the Regents' examinations for the first time after February 1, 1911, for qualifying certificates in law, medicine, dentistry, veterinary science, for admission to examinations for certified public accountant, and for certified shorthand reporter, must earn counts upon examination as follows:

English, three years, 10 counts; elementary algebra, 5 counts; plane geometry, 5 counts; physics and chemistry, 10 counts, or physics and biology, 10 counts, or chemistry and biology, 10 counts; any second year foreign language, 10 counts; American history with civics, 5 counts; electives, 15 counts.

The elective shall be: English fourth year, 3 counts; Latin second year, or Greek second year, or French second year, or German second year, or Spanish second year, or Italian second year, or Hebrew second year, 10 counts; advanced algebra, 5 counts; advanced arithmetic, 2 counts; physical geography, 5 counts; ancient history, 5 counts; history of Great Britain and Ireland, 5 counts; modern history 1, 3 counts; modern history 2, 3 counts; economics, 2 counts; elementary bookkeeping and business practice, 3 counts; advanced bookkeeping and office practice, 5 counts; shorthand 1, 5 counts; shorthand 2, 5 counts; elementary representation, 2 counts; advanced design, 2 counts; advanced representation, 2 counts.

All candidates for such qualifying certificates, who began taking Regents' examinations before February 1, 1911 who do not complete previous requirements in the September, 1911, examination, will be advised, upon application to the Examinations Division of the State Education Department, in what subjects they must take examinations to complete the requirements for a 60 count qualifying certificate; but all counts earned by candidates up to and including the September, 1911, examination will be applied toward such qualifying certificate. In other words, no candidate will lose any of the counts earned in the September, 1911, and previous examinations.

Candidates who present certificates of work in approved secondary schools in lieu of Regents' examinations will be allotted 15 counts, for the successful completion of each full year's work and will be advised when such credit is allotted in what subjects it will be necessary for them to take examinations to complete the requirements for 60 count qualifying certificates. Credit is not given upon certificate for work in evening schools.

Subd. 5. Oath. § 466 Judiciary Law.

§ 466. Attorney's oath of office.

Each person, admitted as prescribed in this chapter must, upon his admission, take the constitutional oath of office in open court and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose. (Code Civ. Pro., § 59.)

In "A Plea for an Improved and Uniform Oath for Attorneys Upon Their Admission to the Bar," Gen. Thomas H. Hubbard, LL. D., in delivering the opening lecture at the Albany Law School in the course on "Legal Ethics," founded by him, considers the origin, purpose, and necessity for amendment of the oath to be taken upon admission to the bar and recommends additional provisions for incorporation therein.

A very complete and interesting resumé of the "Lawyer's Office and Official Oath" is given by Josiah H. Benton, LL. D., in an address under that title delivered before the students of the Albany Law School in the Hubbard course of legal ethics. The American Bar Association in 1908 recommended a form of oath which it em-

bodied in the Canons of Legal Ethics. This recommendation was also made by the New York State Bar Association in 1909.

In *Ex parte Garland*, 4 Wall. 333, the question arose as to the right of petitioner to continue to practice as an attorney and counsellor of the Supreme Court of the United States without taking the oath that he had not voluntarily given aid, countenance or encouragement to the rebellion, or ever taken part in the rebellion, or ever been a member of the Congress of the so-called Federal States, the court held that attorneys and counsellors are not officers of the United States, that they are officers of the court deemed as such by its order upon evidence of their possessing sufficient legal learning and fair private character, and that it was a right of which one could only be deprived by the judgment of the court for moral or professional delinquency; that the petitioner having been pardoned for his offense was relieved from all penalties and disabilities and could not be excluded from practicing his profession in the Federal courts.

Under laws requiring all persons holding "an office or public trust," or all public officers, etc., to take the anti-duelling oath, an attorney cannot be compelled, as a condition precedent to his admission to the bar, to take such oath. *Matter of Attorneys' Oath*, 20 Johns. 492.

People ex rel. Washington v. Nichols, 52 N. Y. 478, cites 20 Johns. 493, as holding that attorneys are not officers within the meaning of the Constitution of 1821 which ordained that no other oath, etc., should be required as a qualification for any office or public trust. 20 Johns. 492 is also cited with approval in *Matter of Hathaway*, 71 N. Y. 238 (244).

Subd. 6. Statute as to Registration, (Judiciary Law, §§ 468, 469).

By chapter 165 of the Laws of 1898 and subsequent amendments, now sections 468 and 469 of the Judiciary Law, all attorneys must file with the clerk of the Court of Appeals an oath or affirmation setting out the date of his admission to practice, and the clerk of that court must keep an official register of such oaths, which is termed the "official register of attorneys and counsellors-at-law in the State of New York."

ARTICLE II.

DUTIES AND LIABILITIES OF ATTORNEYS.

No judge of the Court of Appeals or justice of the Supreme Court, any county judge or surrogate in a county having a population exceeding 120,000 shall practice as an attorney and counsellor in any court of record in the State or act as referee. Constitution, art. 6, § 20.

Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country. *Savings Bank v. Ward*, 100 U. S. 195.

Attorneys do not hold an office or public trust, nor are they judicial officers; they are officers of the court exercising a privilege or franchise, and are subject to removal or suspension by the courts for cause. *Matter of Baum*, 8 Supp. 771.

That an attorney is an officer of the court and is not a public officer of the State in such a sense as to be entitled to have his right to the office determined by a legal action. *Matter of Burcharde*, 27 Hun, 429.

So far as the legal profession is an occupation open to all, there is no reason to consider a lawyer as a public officer. The exercise of this profession is, in part, an occupation in which every person is free to engage; but it is not so in respect to proceedings in the courts of justice. *Matter of Wood*, 2 Cow. 29, note, Hopk. Ch. 7.

It is the duty of an attorney to bring to the conduct of his client's business the ordinary legal knowledge and skill common to members of the legal profession; to act toward his client with the most scrupulous good faith and fidelity, and to exercise, in the course of his employment, that reasonable care and diligence which is usually exercised by lawyers. He is not bound to possess or exercise the highest degree of skill, care, and diligence; nor is he an insurer or guarantor of the results of his work. For the consequences of a failure to perform these duties the attorney is generally liable to his client. 4 "Cyc.", p. 957.

Owing to the fiduciary relations between attorney and client, the court will scrutinize closely all transactions between them, and the burden is on the attorney to show that the contract with his client was fair. *Matter of Holland*, 110 App. Div. 799, 97 Supp. 202.

It is a well-established rule that the burden is upon the attorney to establish affirmatively that his transactions with his client were fair and just; that his client acted on full information of all the material circumstances, and that he did not take undue advantage of his client's complacency, confidence, ignorance, or misconception. *Couse v. Horton*, 23 App. Div. 198, 200, 49 Supp. 132.

An attorney cannot recover on a contract with his client giving him as compensation a certain percentage of moneys realized by the client from a sale of land without showing that the agreement was fair; that the client acted freely and with understanding, and when

making the contract fully understood its purport and had knowledge of all material circumstances known to the attorney, and that he was not guilty of fraud and made no improper use of the confidence imposed in him. *Blaikie v. Post*, 137 App. Div. 648, 122 Supp. 292.

The transactions between attorney and client are scrutinized with extreme vigilance and regarded with the utmost jealousy. The evidence is required that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party, and usually evidence is required that a third and disinterested person advised such party of all his rights. The presumption is against the propriety of the transaction, and the *onus* of establishing the gift or bargain to have been fair, voluntary, and well understood rests upon the claimant, and this is in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property.

In an action brought by a client against her attorney to compel him to account for money which she had paid to him for the purpose of having it invested in real estate mortgages, and which had been lost, owing to the fact that the attorney did not exercise reasonable diligence and such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business, the court will not give effect to an instrument executed by the client to the attorney in which she ratified his acts in her behalf and released him from all liability in respect thereto, unless it appears that the client knew and fully understood the entire transaction and the extent of her legal rights in the premises. *Kissam v. Squires*, 102 App. Div. 536, 92 Supp. 873.

The law, with a wise providence, not only watches over all the transactions of attorneys and clients, but it often interposes to declare transactions void which, between other persons, would be held unobjectionable. *Story, Eq. Juris.*, § 310.

An attorney, who is a judge's partner or clerk, cannot practice before him or in his court; nor can an attorney, who is the surrogate's father or son, practice before him. Judiciary Law, §§ 471, 472.

Sheriffs, constables, coroners, criers, and attendants are prohibited from practicing during their term of office. Judiciary Law, § 473.

The clerk, deputy clerk, or special deputy clerk of a court cannot during his continuance in office practice as an attorney in that court. Judiciary Law, § 250.

By section 479 of the Judiciary Law an attorney may not permit a person not being his agent, law partner, nor clerk in his office to sue out a mandate or prosecute or defend an action in his name.

By section 274 of the Penal Law attorneys are prohibited from buying claims or making certain loans. Under section 272, a partner of the district attorney may not defend a prosecution and an attorney may not defend a person of whom he has been a public prosecutor.

Section 74 of the Code of Civil Procedure, prohibiting attorneys or counselors from procuring retainers by offering or giving any valuable consideration therefor, not only prohibits them from giving it to a desired client for the purpose of obtaining his claim to bring suit upon, but also from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorney's hands for enforcement; such conduct is champertous and subjects the offending attorney to punishment as for a misdemeanor and also to removal from his office. *Matter of Clark*, 184 N. Y. 222, aff'g 108 App. Div. 150, 95 Supp. 388.

Where a person not regularly admitted to practice in the courts of record of the State of New York, and not a party to an action, conducts it in the Municipal Court of the city of New York, the judgment rendered therein is void as violative of Code, sections 63 and 64. *Kaplan v. Berman*, 37 Misc. 502, 75 Supp. 1002.

Plaintiff was admitted to the bar and maintained a law office for about a year, but thereafter discontinued his office and abandoned the practice of law intending never to resume it, and he never filed the certificate required by the Laws of 1898, as amended by the Laws of 1899, which laws make it unlawful for any one to practice law unless he files a certificate required by statute; *held*, that he was not an attorney within the meaning of the statute prohibiting attorneys from suing on assigned claims. *Thompson v. Stiles*, 44 Misc. 334, 89 Supp. 876.

In an action against an attorney for a willful violation of duty in settling a claim against an estate for less than its face value without authority, the plaintiff must establish that the settlement was unauthorized, the validity of the claim, and that it was worth more than the amount collected thereon. An instruction to the jury, therefore, that "when negligence has been proved, if you find there was any, in consequence of which a client has lost his case, it is not

incumbent upon the client to show that but for the negligence he would have succeeded in that action," is erroneous in that it submitted the case upon a wrong theory and authorized the adoption of a wrong measure of damages. *Vooth v. McEachen*, 181 N. Y. 28, rev'g 91 App. Div. 30, 86 Supp. 431.

A settlement of an action to recover damages for causing death entered into upon the consent of the attorney for administratrix with limited letters, set aside. *Happel v. City of N. Y.*, 117 Supp. 627.

An attorney-at-law retained to defend an action for divorce and without power to compromise has no authority under his original retainer to make a contract binding his client to pay a sum of money to his wife. *Joseph v. Platt*, 130 App. Div. 478, 114 Supp. 1065.

It is the duty of an attorney to pay over to his client money collected for him whenever he can do so with safety; and even when there is doubt whether the securities upon which the money was collected did in fact belong to such client, all that he can require from his client on paying over the money to him is an indemnity. *Marvin v. Ellwood & Titus*, 2 Paige, 365.

Where an attorney-at-law having received a check in payment of moneys due his client, an infant, handed the same to the general guardian to whose order the check was payable, and received it back when indorsed by him for the purpose of collecting the check and deducting his fees and disbursements, he cannot, when sued for the sum collected contend that the delivery of the check constituted a payment so that the plaintiff cannot recover as for moneys delivered to him by the defendant, in that the suit is brought solely for moneys collected. *Weber v. Werner*, 138 App. Div. 127, 122 Supp. 943.

Where an attorney deposited the money of his clients in his own name and to his own credit in the bank in which he had carried his account for twelve years, and which had been doing business for over sixty years and which was given a high rating in the commercial agencies and enjoyed the confidence and had the accounts of many prominent customers, and the attorney's course was not in violation of the instructions of his clients, and where the bank failed and a dividend of 40 per cent. was declared on deposits therein, a motion to compel the attorney to make good to the clients the money lost will be denied. *Matter of Shanley*, 57 Misc. 8, 107 Supp. 913.

An attorney who issues a body execution in a case where it is unauthorized by statute is liable to the party arrested for the dam-

ages sustained. *Allen v. Fromme*, 195 N. Y. 404, rev'g 124 App. Div. 936, 109 Supp. 1123.

Where a contract retaining an attorney to prosecute an action for death caused by negligence allows him "40 per cent. of any recovery or settlement, together with the actual costs and disbursements," the court has no power to reduce the amount to which the attorney is entitled under the retainer, although he procured a settlement of the case before trial; the administrator of a person killed by negligence has power to make such contract for a contingent fee. *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514.

In a suit brought by an attorney-at-law under a contract of retainer whereby his client agreed to convey one-fourth of such lands as should be recovered for her in payment of services, to impress a lien upon a portion of said lands which were conveyed by the client to a third party, a finding that the client's equity in the premises retained by her "may not be sufficient" to meet the claims of the attorney is not a finding of fact adverse to such defense interposed by the client. *Butts v. Carey*, 143 App. Div. 356.

The compensation of an attorney or counsellor for his services is governed by agreement with his client, and such agreement cannot be held unconscionable merely on account of the amount he is to receive. A contract which provides for services to be rendered by an attorney in the collection of a claim against a municipal corporation, which can only be collected by an action and which provides that the attorney shall pay all expenses incurred in the prosecution of the claim, violates section 74 of the Code and is invalid. *McCoy v. Gas Engine & Power Co.*, 71 Misc. 537.

A client by accepting a portion of moneys collected for her by her attorney-at-law does not make an accord and satisfaction of her claim against him; she need not return the portion received, it being her own money, before bringing action to recover a balance due. *General Fireproof Construction Co. v. Butterfield*, 143 App. Div. 708.

Any ambiguity in a retainer drawn by an attorney-at-law must be construed most strictly against him. *Butts v. Carey*, 143 App. Div. 356.

An attorney should draw a contract of retainer so plainly as not to require construction, and doubtful clauses will be construed most strongly against him, even though the client executed the contract upon independent advice. *Samuels v. Simpson*, 144 App. Div. 466.

ARTICLE III.

PROCEEDINGS TO ENFORCE ATTORNEY'S LIEN. JUDICIARY LAW,
§§ 474, 475.

Subd. 1. Nature and extent of attorney's lien on cause of action, 161.

Subd. 2. When lien attaches and what constitutes waiver, 165.

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§ 474. *Compensation of attorney or counsellor, 172.*

§ 475. *Attorney's lien in action or special proceeding, 172.*

Subd. 4. Continuance of action by attorney, 176.

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Sections 474 and 475, Judiciary Law, contain without change the provisions of section 66 of the present Code, which was derived from section 303 of the old Code, but amended very materially in 1879 and 1899.

Subd. 1. Nature and Extent of Attorney's Lien on Cause of Action.

The lien of an attorney upon the property of his client in his possession was recognized at common law. It is the right of the attorney to retain possession of such property until his claim for compensation for services has been satisfied. The principle was settled long ago, said Lord Kenyon, in *Reed v. Dupper*, 6 T. R. 362: "That the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry and in many instances at whose expense those fruits are obtained."

The lien of an attorney on the judgment recovered by him for his client has not been so generally recognized, but it is said in *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368, that before the Code nothing was better settled than that the attorney had a lien upon the judgment recovered by him for his services; that the legal measure of those services was the taxable costs, so that it always happened that the extent of the lien was equal to the costs recovered in the action; further that the principle upon which the right was sustained is unaffected by the Code; that the attorney is protected because it is by his labor and skill that the judgment has been recovered, and the judgment being under the control of the courts and the parties within its jurisdiction, the court will see that no injustice is done to its own officers.

At common law the attorney had no right of action for his fees. His right to enforce payment for his services has, however, been fully recognized in this State since *Stevens v. Adams*, 23 Wend. 57,

and his lien upon the funds of his client coming into his hands is well settled. *Matter of Knapp*, 85 N. Y. 284.

The lien of an attorney upon the judgment was recognized in *Randall v. Van Wagenen*, 115 N. Y. 527, but held to be confined thereto and not to exist until after judgment except in case of collusive settlement, in which case he was allowed to continue the action.

The lien of the attorney upon the judgment was invented by the courts to protect attorneys against their clients. *Goodrich v. McDonald*, 112 N. Y. 157.

The distinction between the lien on papers or property of the client in the possession of the attorney and the lien on a judgment has given rise to the terms "charging lien" and "retaining or possessory lien." The "charging lien" is defined as the right of the attorney to charge upon property not in his possession but connected with his employment, his claims arising out of his employment, that is, upon the cause of action or a judgment which may be recovered thereon. The "possessory or retaining lien" is defined as the attorney's right to retain possession of property belonging to his client which comes into his hands within the scope of his employment until his charges are paid. The charging lien is the right to be paid for his services out of the proceeds of his judgment obtained by his labor and skill.

It is said in *Phillips v. Stag*, 2 Edw. Ch. 108, that the lien of an attorney upon a judgment recovered goes no further than the costs in the identical action. Cited in *Williams v. Ingersoll*, 89 N. Y. 517, where it is held that the lien is confined to the judgment in the very action in which the compensation was earned for which the lien is claimed, on the theory that the attorney has by his skill and labor obtained the judgment. When, therefore, an attorney has several actions but recovers judgment in but one of them, he cannot, in the absence of a special agreement, have a lien upon that judgment for his compensation in all the actions.

An attorney-at-law has two liens — a common-law or retaining lien on papers and money which have come into his possession during the progress of the action, and a limited statutory lien on the cause of action or a counterclaim known as a charging lien.

There is no difference between the two liens as regards a forfeiture of the right thereto. *Matter of Rieser*, 137 App. Div. 177, 121 Supp. 1070.

Attorney's liens are of two kinds, general and particular. The general lien attaches to every species of property belonging to the

client which has come to the attorney's possession in the course of his employment, and is founded upon possession and is generally unassignable. The particular lien attaches to a fund or other property made through the attorney's efforts, and is assignable where the assignment carries with it no breach of the attorney's duty to preserve his client's confidence inviolate. *Leask v. Hoagland*, 64 Misc. 156, 118 Supp. 1035; s. c., 136 App. Div. 658.

The distinction between the two classes of liens is fully considered in *Anderson v. Brackeleer*, 28 Civ. Pro. 306, in opinion of Davenport, referee, where the liens are described respectively as a general or retaining lien on the one hand and as a special, particular, or charging lien upon the other. The general lien is said to be a common-law lien giving the attorney the right to retain papers, moneys, or other property of his client until his costs and charges against the client are paid. This lien does not attach unless the papers have come into the possession of the attorney in the course of his professional employment. It extends to property in the attorney's hands not only so as to cover costs and charges in the particular case in which the money was collected, but to the extent of the general balance due to the attorney from the client.

A special lien is the right to recover out of the proceeds of the action in which the attorney had rendered services the amount of his charges in that particular case. It lacks the element of possession, but is founded upon equity upon the ground that an attorney by whose labor a judgment has been obtained should have an interest in that judgment which the law will protect. It was formerly limited to taxable costs and disbursements, but has been generally extended to cover full compensation for services rendered in the action. And it is further said that in the absence of statute this lien attaches only after judgment is rendered, and only to the proceeds of the judgment or award. In the absence of the statute notice of lien is usually required. It will be noted that the amendment to the Code in 1899 provides that the lien shall attach to the cause of action, and subsequent decisions hold that no notice of lien is necessary.

The rule before the amendment to the Code is stated in *Wright v. Wright*, 70 N. Y. 98, to be that an attorney has a lien upon the judgment for the amount of his costs and agreed compensation, but in the absence of notice of lien the defendant in good faith had a right to pay the judgment to the plaintiff.

In *Matter of Regan*, 167 N. Y. 338, it is said that an attorney who has procured for his client a judgment or decree has a lien upon

the same for his compensation, and this lien is not confined to mere taxable costs, but should be such sum as he is entitled to receive under his retainer or under an agreement express or implied.

A general lien of an attorney extends to a balance of account for personal services and attaches to the moneys received and collected. The attorney has a lien for his compensation for professional services and for disbursements upon moneys received by him on his client's behalf in the course of his employment. *Matter of Knapp*, 85 N. Y. 284; *Matter of an Attorney*, 87 N. Y. 521; *Ward v. Craig*, 87 N. Y. 550.

An attorney's lien upon papers of a client in his hands for the compensation due him for services rendered in an action is one strictly personal to the attorney and cannot be transferred by him to a third party. *Sullivan v. Mayor, etc., of New York*, 68 Hun, 544.

When an attorney renders services in an action under an agreement that he shall receive his compensation out of the proceeds thereof he has an equitable lien upon, or ownership, as equitable assignee in such proceeds. When, however, the agreement fixes no sum or way of compensation for his services the attorney in an action to enforce his lien or claim is bound to establish by evidence, competent as against his client, the value of the services. *Harwood v. La Grange*, 137 N. Y. 538.

An attorney's lien for services as a lawyer can only be enforced on behalf of a lawyer and not by a corporation which has contracted for the prosecution of legal proceedings to recover compensation for an owner of lands taken for a public use, and which employs attorneys to perform the service who are made reasonable allowances for their compensation in the final order in the proceeding. A corporation cannot be an attorney and counsellor-at-law nor can it contract to perform the duties of one and employ a lawyer to do the work and assert a lien therefor. *Matter of Bense*, 68 Misc. 70, 124 Supp. 726. See *Matter of Co-operative Law Co.*, 198 N. Y. 479, and chap. 483, Laws of 1909.

Where a substitution of attorneys is sought to be had by the client and it does not appear that the attorney has done any act or been guilty of any omission prejudicial to his client he is entitled to have the amount of his lien ascertained by the court or by a referee and to be paid or have security for the payment of such amount as shall eventually be determined to be justly due him before he can be compelled to turn over papers upon which he has a lien for services. *Matter of Bergstrom & Co.*, 131 App. Div. 791, dis'd; *Matter of Hollins*, 197 N. Y. 361, rev'g 135 App. Div. 918.

A client has the right to change his attorney at any time, with or without cause, but this right can only be exercised upon payment to the attorney of the amount due him. The lien of an attorney is now securely protected by statute and cannot be defeated because the client arbitrarily desires to change his attorney, unless the client discharges the lien by paying to the attorney the amount which he owes him. *Lederer v. Goldston*, 63 Misc. 322, 117 Supp. 151.

From the commencement of an action the attorney who appears for a party has a lien upon his client's cause of action which attaches to his judgment, and after the entry of judgment cannot be affected by any settlement between the parties. The attorney on a contingent retainer has a lien for the percentage of the judgment recovered which was agreed upon and the amount due him is not affected by the fact that the client settled the judgment for a less sum than its amount. *Baxter v. Connor*, 119 App. Div. 450, 104 Supp. 327, citing *Matter of Regan*, 167 N. Y. 343.

It was held in *Matter of Lexington Avenue*, 30 App. Div. 602, that section 66 of the Code of Civil Procedure giving a lien to an attorney upon his client's cause of action does not apply to a special proceeding. It will be noted that this was previous to the amendment of 1899, which expressly provides to the contrary.

No lien exists under section 66 in favor of counsel, and only the attorney of record is entitled to a lien. *Matter of Dailey v. Wellbrock*, 65 App. Div. 523.

Attorneys who conduct all the proceedings in an action for the foreclosure of a mortgage are entitled to a lien thereon as security for their compensation and where, after they have performed such services in the court of original jurisdiction and on appeal, and before the litigation is completed, and upon the substitution of other attorneys for the plaintiff, the plaintiff assigns to them the judgment of foreclosure as security for her indebtedness to them for their services and expenses, the lien thus acquired is superior to the rights of those to whom the plaintiff had previously promised to pay a certain sum of money, upon the sale of the property under the judgment of foreclosure, out of the surplus belonging to her. *Pettibone v. Thomson*, 72 Misc. 486.

Subd. 2. When Lien Attaches and What Constitutes Waiver.

Honest settlements by parties made with no intention to take advantages of their attorneys, but for the simple purpose of ending the litigation, are praiseworthy and should be encouraged. Dishonest and collusive settlements made with intent to defraud the attorneys

upon either side are reprehensible and should be condemned. *National Exhibition Co. v. Crane*, 167 N. Y. 505, 508.

The right of a defendant to procure from the plaintiff a release of the cause of action, so long as it is done honorably and fairly and with due regard to the rights of plaintiff's counsel, of which the defendant has notice, sustained.

It seems that the fact of such settlement should be brought to the attention of the court before a jury has been impaneled, and if the honesty and fairness of the settlement are challenged the court should proceed by reference or otherwise to ascertain the facts and make such order as the circumstances of the case require.

If, however, the defendant waits until the trial is in progress before disclosing the fact that a settlement has been made, and then demands a discontinuance of the action coupled with an offer to pay plaintiff's counsel any sum to which they are entitled, the court should suspend the trial for the purpose of ascertaining the amount which should be thus paid, and if it appears that the fairness and honesty of the alleged settlement are challenged by plaintiff's counsel should take such proofs as will enable it to determine whether the settlement should be enforced or set aside. *Kuehn v. Syracuse Rap. Transit Co.*, 183 N. Y. 456, rev'g 104 App. Div. 580, 93 Supp. 883; aff'd, 186 N. Y. 567.

Where attorneys attempt to enforce against defendants who have settled with their client their lien for fees, under an agreement entitling them to one-half of the sum adjusted, the sum paid in settlement must be taken as the basis of the attorneys' claim. *Neu v. Brooklyn Heights R. R. Co.*, 113 App. Div. 446, 99 Supp. 290.

A clause in an agreement of retainer between attorney and client prohibiting the client from settling the litigation without the consent of the attorney is void as against public policy, and may be repudiated by the client, and a clause therein fixing the value of the attorneys' services at a certain percentage of the moneys to be recovered so closely connected with the clause prohibiting a settlement as to be part of a single plan falls, in case the latter clause is repudiated by the client, and the attorneys in that event are entitled to establish a lien upon the proceeds of the settlement for their services according to their real value without reference to such clause. *Matter of Snyder*, 190 N. Y. 66, rev'g 119 App. Div. 277, 104 Supp. 571.

Where the contract of retainer provided that the attorney should be entitled to a certain percentage for prosecuting a claim

and in a subsequent article of the contract the client agreed not to settle or compromise the claim without the consent in writing of the attorney it was held that the two clauses of the contract were separate and distinct, and that even though the latter was invalid the prior clause fixing the amount of the attorney's compensation was still binding, since the settlement was in fact made after issue joined. *Syme v. Terry & Tench Co.*, 125 App. Div. 610, 110 Supp. 25, dist'g *Matter of Snyder*, 190 N. Y. 66.

The lien of an attorney upon a judgment which he has obtained for a solvent client operates only as a security for his legal claim, and where there is a dispute between him and his client as to the value of the services the client may collect the judgment and execute a satisfaction piece without the knowledge or consent of the attorney. In such case the satisfaction of the judgment does not displace the lien of the attorney, and the latter may, under section 66 of the Code of Civil Procedure, institute proceedings to enforce his lien. He is also entitled to an order authorizing him, if he is unable to collect the amount of his claim from his client, to make a motion to set aside the satisfaction of the judgment. *Corbit v. Watson*, 88 App. Div. 467, 85 Supp. 125.

Where defendants, after having secured a judgment for costs, from which the plaintiff has appealed, settle the action without the consent of or notice to their attorneys, who thereafter obtain an order determining their lien with a provision for such further relief as may be necessary to enforce it, the attorneys are entitled to have the satisfaction of judgment vacated and the judgment reinstated so that they may enforce it to satisfy their lien. So, too, they are entitled to have vacated an order canceling an undertaking given by the plaintiff on appeal where the same was entered without notice or consent, irrespective of whether they can enforce the undertaking. *Knickerbocker Investment Co. v. Voorhees*, 128 App. Div. 639, 112 Supp. 842.

Where an attorney receives property for a specific purpose he must carry out that purpose irrespective of any lien which he might have otherwise, but where an attorney has a lien for services, the fact that moneys were received by him on account of disbursements and that he applied them to the expense of printing cases on appeal does not deprive him of his lien on the printed cases, but he retains a lien thereon as well as upon all other papers in the suit belonging to his client. *Matter of Hollins*, 197 N. Y. 361, rev'g 135 App. Div. 918.

An attorney has no lien for services on copies of the printed record of a case on appeal to the Court of Appeals, which must be filed, and were delivered to and received by him for that purpose, where the cost of printing was paid by his client. *Matter of Bergstrom & Co.*, 131 App. Div. 791.

An attorney who has been retained to file a proof of death and collect an insurance policy has a lien upon such policy for the services which he had rendered. *Matter of Sweeney*, 86 App. Div. 547, 83 Supp. 680.

An attorney-at-law has a lien upon the papers of a client in his possession, independent of the statutory lien given him by section 66 of the Code of Civil Procedure, which entitles him to retain such papers until his claim for services is paid. *Matter of McGuire*, 106 App. Div. 131.

Money of a client which comes to the hands of his attorneys, as such attorneys, they have the right to assert a lien upon, and they may retain the money until their compensation has been agreed upon and the amount ascertained to be due them has either been paid or tendered. *Rose v. Whiteman*, 52 Misc. 210, 101 Supp. 1024.

An attorney having a lien for services may follow his lien upon property in the hands of a third person having notice thereof. *Flannery v. Geiger*, 46 Misc. 619, 92 Supp. 785.

Where the court reduces an extra allowance from \$2,000 to \$200, and it appears that the attorney for the successful party had released his lien upon the judgment in favor of the client, the court should incorporate in its order a provision restoring the attorney's lien upon the judgment, and his lien will be superior to the claim of creditors of his client. *Cooper v. Cooper*, 51 App. Div. 595, 64 Supp. 901.

Section 66 pertaining to special proceedings applies to proceedings in Surrogates' Courts, and gives an attorney a lien upon his client's claim for services rendered in compelling an accounting by executors and administrators. *Matter of Williams*, 187 N. Y. 286.

The attorney for an administratrix who on her accounting has defeated the claim of next of kin that certain property in her hands belonged to the estate is not entitled to a lien upon his client's property under section 66. *Matter of Robinson*, 125 App. Div. 424, 109 Supp. 827; *aff'd*, 192 N. Y. 574.

An attorney may have a lien under section 66 on moneys collected for an estate, notwithstanding he was retained by the administrator. *Matter of Ross*, 123 App. Div. 74.

The lien of an attorney upon the papers of a client in his possession does not extend beyond the interest of the client, and when that interest terminates the lien of necessity also terminates. *Jackson v. American Cigar Box Co.*, 141 App. Div. 195.

The mere fact that the attorney under an agreement for a contingent fee was to receive one-half of the recovery does not render it unconscionable unless it appears from the evidence that it was induced by fraud or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client. *Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520, rev'g 102 App. Div. 627, 92 Supp. 1134, citing *Matter of Fitzsimons*, 174 N. Y. 15.

Where the plaintiff in an action is solvent and able to pay his attorney, the attorney cannot recover the amount of his agreed lien of the defendant. *Gurley v. Gruenstein*, 44 Misc. 268, 89 Supp. 887.

An attorney who obtains his client's property by fraud acquires no lien thereon. *Heyward v. Maynard*, 119 App. Div. 66, 103 Supp. 1028.

An attorney is not entitled to the lien given by section 66 unless he shows performance on his part or a condition of affairs justifying his withdrawal from the case. *Halbert v. Gibbs*, 16 App. Div. 126, 45 Supp. 113, 4 Anno. Cas. 232.

Attorneys cannot insist upon the protection of their lien by summary order, where it is alleged that the nominal plaintiff has made a collusive settlement, in the absence of proof of prejudice to the attorney's rights, since the fact of prejudice of their rights in the matter of collecting payment for their services, an element essential to the application, does not exist. *Matter of Goodale*, 58 Misc. 182, citing *Poole v. Belcha*, 131 N. Y. 200.

Where a railroad settled with the executors of deceased for a claim for damages the attorneys who represented the deceased before his death under agreement for one-half the recovery in an action against the road for personal injuries cannot recover against such fund on *quantum meruit* for their services. *Matter of Carrig*, 36 Misc. 612, 73 Supp. 1123.

An attorney who had received a deed of certain property made a formal declaration that he held the same for the benefit of the plaintiff and "in no other way," and also that he would convey the same to any person whom the plaintiff should designate, and would then

“pay over the proceeds of such sale to the plaintiff.” *Held*, that by this declaration the attorney waived all lien upon such property for his professional services. *West v. Bacon*, 164 N. Y. 425, modif'g 13 App. Div. 371, 43 Supp. 206.

Where an attorney refuses to act in the midst of a litigation unless the client will pay a certain sum which the client either refuses or is unable to pay, the attorney is discharged by his own act and thereby loses any lien for services which he may have had upon any judgment ultimately obtained. *Fargo v. Paul*, 35 Misc. 568, 72 Supp. 21.

Where, after an assignment for the benefit of creditors, the attorney for the assignee procured the assignment to himself of claims of creditors, and on an accounting made no claim other than as creditor on the claims bought, he is deemed to have waived his lien for compensation as attorney in procuring the assignment of the claims. *Matter of Dwight*, 61 App. Div. 357, 70 Supp. 563.

An attorney in prosecuting a case against two joint *tort feors*, under a contract whereby he was to receive one-half the recovery and costs, accepted a sum from one joint tort feor, and gave him a release in which he reserved the right to proceed against the other tort feor for the balance of his lien for services; *held*, that by releasing one tort feor he lost his right to proceed against the other to recover the balance of his lien. *Johanson v. City of New York*, 71 App. Div. 561, 76 Supp. 119.

An attorney who refuses to proceed or to permit any one else to proceed with the trial of an action, unless his claim for services is paid, thereby loses his right to a lien given by section 66. *Halbert v. Gibbs*, 16 App. Div. 126, 45 Supp. 113, 4 Anno. Cas. 232.

In proceeding to impose an attorneys' lien upon certain trust securities recovered by the attorneys from a defaulting trustee they deposited such securities with a trust company awaiting the further action of the court; *held*, that a waiver of the lien cannot be implied from the action of the attorneys in drawing and entering an order in the Supreme Court at the conclusion of the litigation directing the trust company to deliver the securities over to the new trustee; and in inclosing their bill for services and disbursements to the trustee, accompanied by a letter in which they stated that they had no desire to impress a lien upon the fund, but desired him to send a check for the amount, especially where no right of third parties intervened. *Matter of King*, 168 N. Y. 53, modif'g 61 App. Div. 152, 70 Supp. 356.

An attorney-at-law may for a just cause terminate his relation with his client, but if he do so without justification he forfeits his common-law lien on the pleadings and papers in the action. In the latter case, where the client moves for the substitution of attorneys, the former attorney should be required to turn over the pleadings and papers in the action without imposing conditions. Where an attorney, after having been retained by a client in two actions, refused to proceed in one of them because of a dispute between himself and the client respecting sums due the attorney in the other action, which the client settled, he discharged himself as attorney without just cause and lost any common-law lien upon the papers in the pending action. *Matter of Rieser*, 137 App. Div. 177, 121 Supp. 1070.

An attorney has no right to appropriate alimony awarded either as compensation for his services or as payment for disbursements connected with the action. His allowance of counsel fee is deemed sufficient by the court for such matters. *Matter of Bolles*, 78 App. Div. 180, 79 Supp. 530.

In *Randall v. Vanderbilt*, 75 App. Div. 313, 78 Supp. 124, the effect of an agreement by an attorney upon another attorney being substituted in his place is considered so far as relates to his right to a lien sought to be enforced upon a settlement of the litigation.

A contingent fee, amounting to a very large sum, resting on an agreement between a client and one already her confidential adviser and friend as well as counsel, in a case where she was not fully advised how trifling was the risk of an adverse decision, nor that a previous decision of the Appellate Division favorable to her contention had been rendered by the unanimous opinion of all the judges, though there was no fraud in the transaction but the attorney exaggerated the risk in his own mind, should be reduced to a reasonable amount, having regard to the fact that the fee was contingent and the amount of labor required might have been much greater than it proved to be, but under such circumstances not to a mere *quantum meruit* and against such amount should be charged the taxable costs the attorney has collected. *Ransom v. Ransom*, 70 Misc. 30.

Where, after an agreement for the prosecution of an action for a contingent fee, the plaintiff instructs his attorney not to proceed without the co-operation of a certain other attorney who does not attend the trial, for which reason as well as the plaintiff's absence from the trial the complaint is dismissed, the attorney is entitled to recover for the services he has performed on a *quantum meruit*.

In such a case the plaintiff's instruction to the attorney not to proceed with the trial without the co-operation of the other attorney is a breach of his contract. *Seasongood v. Prager*, 70 Misc. 490.

A plaintiff who is concededly able and willing to pay all his attorney's just claims for services and disbursements should be permitted to discontinue the action. Where an attorney commenced an action in violation of his client's instructions he has no lien requiring the protection of the court, and if both parties so desire the action should be discontinued despite the attorney's opposition. *Mitchell v. Mitchell*, 143 App. Div. 172.

As the lien of an attorney on a verdict, decision, or judgment in his client's favor, created by section 475 of the Judiciary Law, dates only "from the commencement of an action or special proceeding," an attorney who was retained on a contingent fee to obtain an award on the condemnation of his client's lands by the city of New York, but whose retainer was revoked before the service of the application for the appointment of commissioners of estimate and assessment in the condemnation proceeding, cannot assert a lien on the award subsequently made, as the condemnation proceedings were not "commenced" until the service of said application. Under such circumstances the remedy of the attorney, if any, is by action against the client for a breach of contract. *Matter of Albers Realty Co.*, 140 App. Div. 277.

Subd. 3. Method of Enforcement of Lien Under §§ 474 and 475, Judiciary Law.

§ 474. Compensation of attorney or counsellor.

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. (Code Civ. Pro., § 66.)

§ 475. Attorney's lien in action or special proceeding.

From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report or decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien. (Code Civ. Pro., § 66.)

The effect of section 66 of the Code, as amended in 1879 and 1899, is very fully considered and explained in *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, where it is said that the amendment of 1899 made section 66 applicable to a special proceeding and provided a new remedy for the attorney. It is further held that the statute is remedial in its character and should be construed liberally

in aid of the object sought which was to furnish security to attorneys by giving them a lien on the cause of action.

Since the amendment to section 66 of the Code of Civil Procedure made by chapter 542 of the Laws of 1879, an attorney need not give notice of his lien, and any party settling without the knowledge of the attorney does so at his peril.

Even though a judgment in favor of the client is entered to protect her attorney's lien, he must first resort to the client for payment, the judgment meanwhile standing as security and he cannot resort to it until he has exhausted his remedy against the client, or has shown that she is insolvent, and that it will be futile to pursue the claim. *Webb v. Parker*, 130 App. Div. 92, 114 Supp. 489.

Peri v. N. Y. C. & H. R. R. Co., 152 N. Y. 521, was decided before the amendment of 1899, and the procedure was there in form of an application for an order vacating the satisfaction of the judgment entered for the plaintiff and directing the sheriff to enforce the judgment to the extent of the lien of the plaintiff's attorney thereon. It was there held that the language of the section as it then stood was comprehensive, creating a lien in favor of the attorney and his client's cause of action in whatever form it might assume in the course of the litigation and enabled him to follow the proceeds into the hands of third persons without regard to any settlement before or after judgment. It was further held that the existence of the lien does not permit an attorney to stand in the way of a settlement, and that the client is competent to decide whether he will continue the litigation or agree with his adversary, but that the lien operates as a security, and if the settlement is in disregard of it and to the prejudice of plaintiff's attorney, by reason of the insolvency of the client or for other cause, the court may protect the attorney by vacating the satisfaction of judgment and permitting an execution to issue for the enforcement of the judgment to the extent of the lien or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien.

Since the amendment to the Code giving a lien on a cause of action the necessity for the judgment in the action in order to obtain a lien no longer exists, and while this lien does not prevent an honest settlement of the action, if the client settles and extinguishes the cause of action, the lien is carried along to the sum agreed upon in settlement the same as it is carried along to the judgment where there is one. Notice of the lien need not be given defendant and the defendant cannot, by paying over the sum agreed upon in

settlement, defeat the right to enforce the lien; nor is the defendant entitled to a jury trial in a suit in equity, as there is no right to a jury in equity unless it is given by statute. *Fenwick v. Mitchell*, 34 Misc. 617, 70 Supp. 667; rev'd, 64 App. Div. 621, 72 Supp. 1102.

Where defendants, after having secured a judgment for costs from which the plaintiff has appealed, settle the action without the consent of or notice to their attorneys, who thereafter obtain an order determining their lien with a provision for such further relief as may be necessary to enforce it, the attorneys are entitled to have the satisfaction of judgment vacated and the judgment reinstated so that they may enforce it to satisfy their lien. So, too, they are entitled to have vacated an order canceling an undertaking given by the plaintiff on appeal where the same was entered without notice or consent, irrespective of whether they can enforce the undertaking. *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 Supp. 842

But the remedy by way of petition does not seem to be available in case of settlement before judgment and effort to compel defendant to pay the attorney's claim. *Rochfort v. Met. St. R. R. Co.*, 50 App. Div. 261 (p. 265), where it is said: "Prior to the amendment of 1899, except in special instances such as where there is a fund in court, the lien of an attorney is to be determined and its payment enforced, not in a summary way on motion or petition, but in the usual way by an action, legal or equitable. It follows that the practice thus sanctioned is not to be departed from unless expressly changed by the addition made to section 66 of the Code by the amendment of 1899. The language of the amendment would seemingly confine it to the adjustment of differences between the plaintiff and his attorney, and, as urged by the appellant, enable the court on petition to administer a fund in possession of the court so that an attorney would be protected, to prevent the satisfaction of a judgment to his prejudice, or to set aside the satisfaction of a judgment so as to permit the attorney, if needful, to enforce his lien. There is nothing in the language of the amendment that in terms applies to a defendant or that takes away from him the right to have his day in court upon the question of his liability and the extent thereof."

It is not clear that the holding in 50 App. Div. 261, to the effect that the proceeding by petition is not the proper method where relief is sought against a defendant before judgment is the correct

rule in view of the fact that this decision was made previous to the determination by the Court of Appeals in the *Fischer-Hansen* case; but since that decision does not expressly overrule 50 App. Div. 261, the latter has evidently been assumed to be the controlling authority on that point. The same rule was held in the Appellate Term in *Dermuth v. Marks*, 84 Supp. 453. It is said, however, in *Corbit v. Watson*, 88 App. Div. 467, where a motion was made to vacate the satisfaction of a judgment, that the attorney may proceed to have the amount of his claim liquidated by the special proceeding, authorized by section 66, and that that section furnishes the means of ascertaining the amount of the lien.

Apart from the statute and in addition to the statutory lien an attorney has a common-law lien upon any papers, securities, or other property delivered to him by his client where no action or proceeding is commenced or pending, and upon the application of the client the court has inherent authority to determine the amount of the lien upon payment thereof or security given to require the attorney to return the property of the client. This summary authority is limited to the professional relation of attorneys and clients, and does not extend to transactions of a business nature. *Matter of Ney Co.*, 114 App. Div. 468.

In a proceeding to enforce an attorney's lien for services where there is an issue presented, a Special Term should treat the record as presenting an issue upon which nothing short of a complete and thorough hearing either in open court or before a referee will satisfy the demands of justice. *Matter of Speranza*, 186 N. Y. 280, rev'g 114 App. Div. 913.

An attorney has his remedy to enforce his lien under section 66 of the Code, which is not a motion in the action, and also by an action in equity to establish and to enforce his lien, while the action may be continued as a remedy against fraudulent settlements. *Russo v. Darmstadt*, 116 App. Div. 887, 102 Supp. 209.

The remedies of an attorney to enforce a lien upon settlement of an action or judgment without his consent may therefore be classified as follows:

First: In case of settlement before judgment where the settlement is collusive he may apply for leave to continue the suit. This method, as we have seen, although it may still be resorted to, is practically obsolete and needs no further consideration as it has been superseded by the more effective remedies by reason of the amendment of 1899 and the decision in *Fischer-Hansen v. Brooklyn Heights*, *supra*.

Second: Petition, as provided for by former section 66 (now Judiciary Law, § 475). This is most available where claim is made against the client and the defendant is not sought to be charged, and it seems to be available in case of settlement either before or after judgment.

Third: Action in equity in case of settlement at any time where relief is sought against defendant as well as against the client. This method seems to be followed most frequently and is apparently most satisfactory in its results. (See following subdivision.)

Subd. 4. Continuance of Actions by Attorney.

The right of the parties to an action to settle the litigation does not require the court to carry into effect a settlement made for the purpose of depriving the defendant's attorney of his costs. In such a case a discontinuance of the action will be refused except upon terms which will protect the attorney. The action of a trial judge in marking a case settled is equivalent to a discontinuance of the action. *Matter of Rogers v. Marcus*, 93 App. Div. 552.

Where a lien is claimed by an attorney against the client only, the remedy by petition seems to be the more appropriate and is approved in *Matter of King*, 168 N. Y. 53.

In *Sullivan v. McCann*, 113 App. Div. 61, 67, it is held that the action should not have been continued for the mere purpose of fixing the amount of the attorney's compensation, but that the attorney, having the contract with his clients, had a right to have the amount due as between himself and his clients fixed under the provisions of section 66 and granted leave to institute such proceedings.

In case of settlement before judgment, the remedy by way of allowing the action to proceed by direction of the court is also allowable where the settlement is collusive and for the purpose of defrauding the attorney. This was practically the exclusive remedy before 1899. *Randall v. Van Wagenen*, 115 N. Y. 527.

This method, however, is characterized in the *Fischer-Hensen* case as "clumsy and illogical;" its effect is to ratify the settlement. It has also, since the decision in that case in 1903, fallen into disuse.

An attorney can enforce his lien for his protection only, and where a responsible client discontinues his action his attorney cannot have the order of discontinuance set aside, although irregular, because it failed to provide for costs, but he must look to the client for compensation. *McKay v. Morris*, 35 Misc. 571, 72 Supp. 23.

Where the plaintiff in an action has accepted an amount less than his claim in settlement and is solvent and able to pay the sums to which his attorneys are entitled, and where it appears that there was no collusion with a view to prejudice the attorneys, the court will not allow the latter to prosecute the action to judgment for the purpose of enforcing their lien for services under section 66. *Young v. Howell*, 64 App. Div. 246, 72 Supp. 5.

An attorney was engaged to oppose the probating of a will, under an agreement that he should have as a fee 8 per cent. of any sum that was awarded his client, whether by settlement or as the result of legal proceedings, and he also received an assignment of 8 per cent. of his client's claim. The client settled without the attorney's knowledge and he opposed the motion to discontinue the action; *held*, that section 66 did not give him a right to prevent a discontinuance, nor did the assignment permit him to substitute himself as a plaintiff in the suit, even though the executors were aware of his claim. *Matter of Evans*, 58 App. Div. 502, 69 Supp. 482.

The court will rarely permit an action to be continued for the benefit of the attorneys, but where the plaintiff without the knowledge or consent of the attorneys effects a settlement of the action, if the plaintiff is not financially responsible, the attorneys may enforce their lien for services either in equity or a proceeding under section 66. *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 Supp. 351.

While the court will preserve the lien of an attorney and prevent him from being cheated by collusion and fraudulent settlements, a discontinuance asked by both parties should not be denied where it is doubtful that the plaintiff's attorney opposing the motion was ever authorized to bring the action. *Matter of Kelly v. N. Y. City Railway Co.*, 122 App. Div. 467, 106 Supp. 894.

Where there is no counterclaim there cannot be any statutory lien in favor of defendant's attorney; and where a settlement is made between the parties in good faith the defendant's attorney is not authorized to prosecute an appeal for the mere purpose of securing his fees. *Crossman v. Smith*, 116 App. Div. 791, 102 Supp. 18.

Subd. 5. Proceedings by Petition.

A proceeding under section 66 is a special proceeding and not an action and no formal judgment can be entered thereon. If a reference is ordered the matter must come back to the court for final determination, and it must be considered as a report to the court on

a reference to determine and report upon a question of fact. *Sullivan v. McCann*, 124 App. Div. 126, 108 Supp. 909.

Where an attorney has a lien for his services upon a fund in court, the court has power to determine and enforce such lien upon the attorney's petition and to order a reference to ascertain its amount where the attorney claims upon the *quantum meruit*. *Matter of Thomasson v. Latourette*, 63 App. Div. 408.

In *Matter of King*, 168 N. Y. 53, attorneys petitioned under section 66 for an order to have the amount of their lien determined and enforced as against the client, a foreign trustee. It was held that the court had power to determine the amount for which the lien should be established. The Special Term appointed a referee to ascertain and report the value of the petitioners' services; the Appellate Division reversed the order and denied the petitioners' application. The Court of Appeals held that the order of the Appellate Division denying the petitioners' application should be reversed, holding that the petitioners had a lien created by statute, and that the proceedings provided for by the Code are instituted by a petition and are in the nature of the foreclosure of a lien; that the Special Term could have retained the proceedings and tried the question but had the discretion to appoint a referee; that the remedy is appealable in its character and the equity side of the court has jurisdiction, the procedure being analogous to the foreclosure of a mechanic's lien.

It was held in *Cohn v. Polstein*, 41 Misc. 431 (435), 84 Supp. 1072, that an attorney may bring an action to foreclose his lien where the action is settled before judgment, but such relief is cumulative and the court may not deprive the petitioner of the remedy for the enforcement of his right under section 66; aff'd, 94 App. Div. 619; and where an action of partition was settled before judgment on application of the attorney, an order was entered, following the procedure in *Matter of Department Works*, 167 N. Y. 501; *Matter of King*, 168 N. Y. 53, and *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521, appointing a referee to take proof of the facts and circumstances, with directions to report the testimony together with findings of facts and conclusions of law to the court.

An application by attorneys for an order under section 66 will be denied where the moving papers do not show the amount of the compensation claimed by the attorneys or that the plaintiff is not financially responsible. *Smith v. Acker Process Co.*, 102 App. Div. 170.

Power conferred on the court by section 66, which authorized the court on petition of an attorney or his client to determine and enforce the attorney's lien, necessarily includes the power of the court to determine in a summary way whether or not a lien exists. *Radley v. Gaylor*, 98 App. Div. 158.

An application by attorneys in a proceeding in a Surrogate's Court for an accounting, to vacate the satisfaction of a decree rendered therein, on the ground that it was executed in disregard of their lien for services and by collusion, after notice of the lien to the executor and to the distributees, is a special proceeding, and an order of the surrogate vacating the satisfaction is a final order in that proceeding, reviewable by the Court of Appeals.

An attorney has a lien for services rendered in a Surrogate's Court upon a decree in a probate matter, made before the amendment of section 66 of the Code of Civil Procedure, giving an attorney a lien in a special proceeding, took effect, and upon his application, when the amount thereof has been liquidated by a judgment at law, the surrogate has power to protect the lien by vacating a satisfaction of the decree made in disregard of the attorney's rights. *Matter of Regan*, 167 N. Y. 338, rev'g 58 App. Div. 1.

A surrogate has power under section 66, upon a petition, to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate. To that end, he may appoint a referee to take testimony and report the value of the services, and although the executors are primarily personally liable for the services of an attorney, yet such services when necessary are chargeable as a lien upon the estate. *Matter of Smith*, 111 App. Div. 23.

Precedents in Proceeding to Determine and Enforce Attorney's Lien in Surrogate's Court (*Matter of Smith*, 111 App. Div. 23).

Petition.

SURROGATE'S COURT — ALBANY COUNTY.

IN THE MATTER OF THE JUDICIAL SETTLEMENT
OF THE ACCOUNT OF PROCEEDINGS OF
WILLIAM A. SMITH AND IRVING R.
COUGHTRY, AS EXECUTORS OF THE LAST
WILL AND TESTAMENT OF MATTHEW W.
BENDER, DECEASED.

To the Surrogate of the County of Albany:

The petition of Robert G. Scherer and J. Murray Downs respectfully shows:

I. That your petitioners are and were, during all of the times herein-after mentioned, attorneys-at-law, duly licensed to practice in the courts

of the State of New York, and co-partners carrying on the practice of their profession under the firm name and style of "Scherer & Downs," at the City of Albany, New York.

II. That heretofore and on or about the 25th day of May, 1903, the will of one Matthew W. Bender, deceased, was duly admitted to probate by the Surrogate of Albany County and letters testamentary thereon were issued to William A. Smith and Irving R. Coughtry as executor of and under the said last will and testament of Matthew W. Bender, deceased; and the said executors thereupon duly qualified and entered upon the performance of their duties as executors. That the said William A. Smith was a legatee under the said last will and testament to the amount of two thousand dollars (\$2,000); and that the said Irving R. Coughtry was also a legatee under the said last will and testament, receiving as a specific legacy the sum of five thousand dollars (\$5,000); and being also a residuary legatee to the extent of one-fifth of the residue, which amounts to upward of five thousand dollars (\$5,000).

III. That thereupon and on or about the 25th day of May, 1903, the said William A. Smith and Irving R. Coughtry, the said executors, retained your petitioners as attorneys and counsellors for the purpose of assisting them in the care, management and settlement of the said estate of Matthew W. Bender, deceased; and that acting under the said retainer your petitioners have performed all such services they were requested to perform and have rendered work and services on behalf of the said executors in the care and management and settlement of the said estate, and will render certain other services in connection with the said estate, all of which services are of the value of twenty-five hundred dollars (\$2,500). That your petitioners have demanded of the said executors payment for the services so rendered, which demand the executors have refused to comply with and still refuse, and that no part of the services rendered by the said attorneys have been paid for by the said executors, and that your petitioners have a lien upon the funds in the hands of the said executors, and also upon their respective legacies and interests in the said estate to the extent of the said sum of twenty-five hundred dollars (\$2,500).

IV. That the said executors are proceeding for a final distribution of the said estate and for a final judicial settlement of their accounts as executors, which proceeding is now pending in the Surrogate's Court of Albany County, and that it is necessary that the amount of the lien of your petitioners should be ascertained and fixed, in order that the same may be protected before the distribution of the estate of the said Matthew W. Bender, deceased.

WHEREFORE, Your petitioners pray that the Surrogate, by virtue of the powers conferred upon him by section 66 of the Code of Civil Procedure, will determine the extent and the amount of the lien of your petitioners for their services and enforce the same; and for that purpose require the said William A. Smith and Irving R. Coughtry to show cause before the Surrogate of Albany County on the 24th day of May, 1904, why the said lien should not be determined and enforced.

Dated, Albany, N. Y., May 12, 1904.

(Verification by both petitioners.)

ROBERT G. SCHERER,
J. MURRAY DOWNS.

(Same title.)

Referee's Report.

Pursuant to the order of the Surrogate of the County of Albany, made herein on the 13th day of June, 1904, directing me as referee, appointed by said order for the purpose, to take proof as to the amount, character, and value of the services rendered by the said Scherer & Downs on behalf of the said William A. Smith and Irving R. Coughtry, individually and as executors, and as to any payments made on account thereof, and to report such proof and opinion of the referee to the court, I report and return herewith, as a part of this report, the oath taken by me as referee and the proofs taken herein by me as referee, the same being typewritten and in book form, each witness having testified before me as stated in the deposition signed by him. I report,

First. That the value of the services rendered by Messrs. Scherer & Downs on behalf of William A. Smith and Irving R. Coughtry, individually and as executors, in the above-entitled matters, respectively, is the sum of \$1,500.

Second. That they have been paid upon account thereof by the said executors the sum of \$200.

Third. That the amount and character of their said services and my opinion thereon and of the value thereof and of payments thereon are as follows: Robert G. Scherer and J. Murray Downs at the times mentioned in the proofs in this proceeding were and still are attorneys and counsellors-at-law, practicing law under the firm name of Scherer & Downs with offices in the City of Albany; Matthew W. Bender, late of the City and County of Albany, died in said city, May 21, 1903, having previously made his last will and testament, wherein the said William A. Smith and Irving R. Coughtry were named as executors thereof; said executors brought the said will to Scherer & Downs and employed them to procure the probate thereof and assist them in the administration and settlement of the estate. . . . I think \$1,500, under the circumstances, a reasonable compensation for their services. . . . Scherer & Downs admit the payment of \$200.

Dated, July 20, 1904.

**Proceeding to Have Attorney's Lien Determined and Enforced
Against Securities Belonging to Client (Matter of King,
168 N. Y. 53).**

Petition.

To the Supreme Court, New York County:

The petition of David Bennett King and Henry W. Jessup respectfully shows to this court and alleges:

I. That they are the attorneys of record for the plaintiff in an action long pending in this court wherein the plaintiff is Theodore C. English, as trustee, substituted for Isaac H. Williamson as trustee under the last will of Benjamin Williamson, deceased, and wherein the defendants are Thomas A. McIntyre, Edward L. Adams, Samuel Taylor, Jr., James G. Marshall, and Harry B. Day.

II. That said action was brought in part to recover certain securities from the said named defendants, upon the allegation that they had taken the same as margins on a speculative account from plaintiff's predecessor trustee, with notice of their trust character, and of his lack of power to pledge said trust securities.

III. That this action was begun in the spring of 1896, at which time your petitioners formed a partnership for the practice of law, and were

retained by the said English for the purpose of prosecuting said litigation and recovering said securities and that the said English had little evidence available of the material facts involved; that the result was then deemed very doubtful; that these petitioners took the case on a contingent basis, as well as another case against Robert J. Kimball & Co., for similar acts with said predecessor trustee, which proceeding was settled, and out of the proceeds of said settlement said English defrayed the disbursements of this action. That said English desired to bring an action in conversion, which your petitioners refrained from doing; that the measure of damages in an action for conversion would have been approximately, fifty thousand dollars (\$50,000); that the said English was repeatedly ready to settle the said action, while pending, for fifty thousand dollars (\$50,000); that the action brought by advice of petitioners was an action more difficult to maintain and to get evidence in support of, but that the settlement hereinafter referred to has resulted in the said trustee getting back the identical securities diverted by the predecessor trustee, which are at present worth seventy thousand dollars (\$70,000) and upward.

IV. That the said action was bitterly litigated, and that for over four and a half years the petitioners were actively occupied in various phases of the litigation or of the situation arising thereout of, with the result of securing an interlocutory judgment in favor of the plaintiff, an affirmance thereof on appeal to the Appellate Division, an accounting before a referee and final judgment by the court and, while an appeal to the Court of Appeals from said final judgment was pending, the negotiation of a settlement of the said action under conditions such as that the defendants agreed to turn over intact the securities specified in the complaint and to pay the costs of the action.

V. That petitioners attended upon said settlement, one of the terms of which was the consent to the entry of an order, which was consented to, to the effect that the Central Trust Company of New York, with whom the securities had been deposited pending the defendants' appeal to the Court of Appeals, should turn the securities over to the said English as trustee, and that upon filing his receipt therefor the said action should be discontinued, and that such order was in fact entered; that before the entry of said order the plaintiff requested petitioners to render him a statement of the amount of their charge for services to him during the four and a half years and over during which they had acted as his attorneys.

VI. That the said English as trustee is a resident of Elizabeth, N. J., and was appointed by the Orphans' Court of Union County, N. J.; that it was stated by him upon receipt of the securities from the Central Trust Company he would remove the same to the State of his appointment; that these securities are as follows:
(Here follows schedule.)

VII. That petitioners accordingly rendered a bill for their services to the said English and refrained from itemizing the same at his request; that annexed to this petition is a copy of said bill marked "A" and referred to as if set forth at length herein.

VIII. That the amount stipulated in said bill as the balance due to petitioners for their services was exclusive of the costs and allowances paid them upon such settlement, which amount had been paid to them by McIntyre & Wardwell upon the settlement, with the consent of the

said English; that said charge was reasonable, taking into consideration the services rendered, the length of time consumed, the importance of the interests involved, the standing and reputation of petitioners and the entire success of all their endeavors in behalf of the plaintiff as trustee.

IX. That after receipt of said bill the said English waited upon petitioners and stated that while he was willing that they should receive all to which they were entitled, he desired to have the approval, in advance, of the Chancellor of New Jersey, or of the Judge of the Orphans' Court, in order that no question might arise upon his accounting; that thereafter he again waited upon petitioners and stated that he had seen the Judge of the Orphans' Court and that it would be impossible for him to secure in advance his approval of said charge; that the same was high from a New Jersey standpoint and he refused to pay the same or any part thereof, although payment thereof has been demanded.

X. That on the 3d day of December, 1900, your petitioners accordingly served upon the said Theodore C. English as trustee, and upon the Central Trust Company of New York, the depository aforesaid, a notice of their attorneys' lien upon the said securities above specified.

XI. Your petitioners further show that by amendment to section 66 of the Code of Civil Procedure in 1899, it is provided that the court may determine and enforce the lien of an attorney upon the petition either of said attorney or of the client.

WHEREFORE, Petitioners pray that this court do determine the amount to which the petitioners are entitled as compensation on a *quantum meruit* or otherwise, as to the court may seem just and proper, and direct how the lien of the petitioners upon the securities mentioned in this petition shall be enforced.

(Verified, December 12, 1900.)

DAVID BENNETT KING,
HENRY W. JESSUP,
Petitioners.

Order Appointing Referee to Hear and Determine Lien of Attorneys.

Present — Hon. JAMES A. BLANCHARD, *Justice.*

(Caption.)

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE PETITION OF DAVID
BENNETT KING AND HENRY W. JES-
SUP TO ENFORCE AN ATTORNEYS, LIEN.

A petition, duly verified, having been presented to this court by David Bennett King and Henry W. Jessup, under section 66 of the Code of Civil Procedure, to have determined and enforced their attorneys' lien on certain securities described in said petition now in the hands of the Central Trust Company of New York.
(Here follow recitals.)

On motion of David Bennett King and Henry W. Jessup, attorneys in person, it is

Ordered, That the prayer of said petition be granted, and that it be referred to Alex. T. Mason, Esq., counsellor-at-law, as referee, to hear and report with his opinion with all convenient speed the claim of the said David Bennett King and Henry W. Jessup, to compensation for

their services to Theodore C. English, as trustee substituted for Isaac H. Williamson, as trustee, under the last will of Benjamin Williamson, deceased, in the above-mentioned action, wherein Theodore C. English as trustee, substituted for Isaac H. Williamson as trustee, under the last will of Benjamin Williamson, deceased, was plaintiff, and Thomas A. McIntyre, Edward L. Adams, Samuel Taylor, Jr., James G. Marshall and Harry B. Day were defendants.

Enter.

JAMES A. BLANCHARD,
J. S. C.

Subd. 6. Proceeding by Action in Equity.

In an action for the enforcement of an attorney's lien, plaintiff must show that he comes within the statute by establishing facts alleged in his complaint, and is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff, or was waived or forfeited by his misconduct or neglect. *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, rev'g 63 App. Div. 356, 71 Supp. 513.

Under section 66 an attorney may maintain an equitable action to have his services in a foreclosure suit declared a lien upon the land purchased by the mortgagee executrix, where the mortgagee died before the entry of the judgment and the action was completed by another attorney employed by the executrix. *Skinner v. Busse*, 38 Misc. 265, 77 Supp. 560.

The statutory lien given by section 66 is not exclusive but cumulative, for the power to ascertain and enforce an attorney's lien had been exercised by courts of equity prior to the enactment of the Code provisions; *held*, that an attorney who, under the employment of a contract, or, who had entered into an agreement with the State of Iowa, rendered services to the contractor out of court might, without joining the State of Iowa as a party, maintain an action against the contractor to determine the extent of, and to enforce payment of, his lien on the papers in his possession and on moneys to become due to the contractor upon the complete performance of his contract. *Mathot v. Triebel*, 98 App. Div. 328, 90 Supp. 903.

In *Ransom v. Cutting*, 112 App. Div. 150, 98 Supp. 282, it was held that an action to enforce an attorney's lien was properly brought in equity; *aff'd*, 188 N. Y. 447.

An administratrix and an attorney entered into an agreement by the terms of which the attorney was to prosecute actions for the purpose of recovering insurance on the life of the husband and intestate of the administratrix, the attorney to have a certain part of the amount recovered if successful and nothing, if nothing was recovered;

held, the agreement gave the attorney a lien on the amount recovered which could be enforced in equity by the attorney against any one having possession of the amount and against the administratrix, it being unnecessary to wait until the surrogate allowed the claim on the administratrix's final accounting. *Kennedy v. Steele*, 35 Misc. 105, 71 Supp. 237.

The court may enforce the lien of the attorney for a judgment creditor as against a receiver of the judgment creditor and a trustee of his estate in bankruptcy, where the lien attached more than four months prior to the bankruptcy and there is no restraining order. *Kneeland v. Pennell*, 54 Misc. 43, 104 Supp. 498.

Although the Municipal Court of the city of New York has no jurisdiction to enforce an attorney's lien, an attorney who has rendered services in an action brought in that court is entitled to a lien under section 66 of the Code of Civil Procedure, and may maintain an action in the Supreme Court to enforce it. *Tynan v. Mart*, 53 Misc. 49, 103 Supp. 1033.

In an action to enforce an attorney's lien the client himself is a necessary party, being entitled to be heard as to the existence of the lien and the attorney's right to enforce it; but when the client has departed from the State he may be served by substitution for the process, for the action is *in rem*. When in such action to enforce an attorney's lien it appears that the client has departed from the State and is financially irresponsible, it is not error for the judgment to provide that the execution be issued against the client and returned unsatisfied before the defendant is bound to pay. *Oishei v. Penna. R. R. Co.*, 117 App. Div. 110, 102 Supp. 368; *aff'd*, 191 N. Y. 544; s. c., 101 App. Div. 473.

In an action to enforce their lien against defendants who have settled with their client, attorneys cannot recover more than the sum to which they were entitled under their contract with the client. *Neu v. Brooklyn Heights R. R. Co.*, 113 App. Div. 446.

A determination by the Supreme Court, made in a proceeding for a substitution of attorneys, that the attorneys sought to be removed and their privies have, through their misconduct, lost all lien or claim upon a judgment in favor of their client by virtue of certain contracts made with the latter, is conclusive upon the delinquent attorneys and their privies in an action brought by them, against the client, after the filing of the referee's report in the substitution proceeding, to compel the specific performance of such contracts. *Matter of Barkley*, 42 App. Div. 587, 59 Supp. 742; appeal dismissed, 161 N. Y. 647.

**Complaint in Equitable Action to Enforce Attorney's Lien
(Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y.
492).**

Complaint.

SUPREME COURT — KINGS COUNTY.

CARL FISCHER-HANSEN,	}
PLAINTIFF,	
vs.	
LOUIS OLSEN AND THE BROOKLYN HEIGHTS RAILROAD COMPANY, DEFENDANTS.	

Plaintiff, complaining of the defendants in this action, respectfully alleges and shows to this court:

First. That at the time or times hereinafter mentioned, said plaintiff was and he still is an attorney and counsellor-at-law of the State of New York, and that he then was and still is duly licensed, authorized and qualified to practice his profession as an attorney and counsellor-at-law in all the courts of said State.

Second. That on the 5th day of January, 1900, the defendant Louis Olsen retained this plaintiff as his attorney and counsel to commence and prosecute for him, as plaintiff therein, an action against the defendant herein, The Brooklyn Heights Railroad Company, and sole defendant therein, for the recovery of fifty thousand dollars (\$50,000) damages for certain personal injuries received and sustained by said Louis Olsen on the 2d day of January, 1900, at the corner of Richards and Verona streets in the Borough of Brooklyn, through the gross negligence, carelessness and recklessness of said defendant, The Brooklyn Heights Railroad Company, in suddenly setting one of its cars, then controlled and being operated by it, in motion after bringing it to the standstill, and while said defendant, Louis Olsen, was in the act of getting aboard the front platform of said car at the place aforesaid, whereby said defendant, Louis Olsen, was thrown from the said front platform of said car and then and there had his right leg cut off from above the knee by the wheels of said car.

Third. That in consideration of the professional services to be rendered and the disbursements to be laid out by this plaintiff in behalf of the said Olsen, as the plaintiff in said action, said defendant, Louis Olsen, made an agreement in writing, executed by him and dated on the 5th day of January, 1900, wherein and whereby he agreed that this plaintiff as his attorney, should have one clear half, 50 per cent., of the verdict recovered in said action.

Fourth. That on the 6th day of January, 1900, an action was commenced in this court upon the cause of action mentioned and set forth in paragraph 2 hereof and more particularly described in Plaintiff's Exhibit "A," hereto annexed, by this plaintiff, under said retainer and agreement, as the attorney and of counsel for said Louis Olsen, the plaintiff therein, and a defendant herein, against the defendant, The Brooklyn Heights Railroad Company, as sole defendant therein, by the service of a summons upon said defendant, The Brooklyn Heights Railroad Company personally therein, on which said summons was indorsed a written notice of this plaintiff's lien in said action, of which the following is a copy, to wit:

"To the defendant:

"Take notice that I have a lien under my written retainer by the plaintiff, upon the papers and upon the subject-matter of the within entitled action, for my fees, services and disbursements, and you are hereby requested to make no settlement with the plaintiff or any other person, but to make it with the undersigned.

CARL FISCHER-HANSEN,
Plaintiff's Attorney."

Fifth. That on the 25th day of January, 1900, the defendant in said action, The Brooklyn Heights Railroad Company, duly appeared therein by Sheehan & Collin, Esquires, its attorneys, and, upon said day formally and duly served a written notice of appearance upon this plaintiff, who was the plaintiff's attorney in said action, wherein and whereby they demanded the service on them, as such attorneys, of a complaint of the plaintiff and all other papers in said action.

Sixth. That on the 2d day of March, 1900, this plaintiff having immediately previously drawn the complaint in said action, the defendant, Louis Olsen, the plaintiff in said action, signed and verified his said complaint in said action, a copy of which is hereto annexed, marked Exhibit "A," and that a copy of said complaint on said day was duly served by this deponent on the said Sheehan & Collins, Esquires, as the aforesaid attorneys of the defendant in said action, The Brooklyn Heights Railroad Company, who, as such attorneys, indorsed upon the original of said complaint a written acknowledgment of the receipt by them of a copy of said complaint on said date.

Seventh. That on the 21st day of March, 1900, said defendant in said action, and herein, The Brooklyn Heights Railroad Company, through said attorneys, served upon this plaintiff, as the attorney for the plaintiff in said action, a written verified answer, of which the annexed is a copy marked Exhibit "B," which said answer admits that said defendant in said action is a domestic surface railroad incorporation, but denies any liability in said action, and demands an affirmative judgment in its behalf therein.

Eighth. That on the 22d day of March, 1900, the defendant, Louis Olsen, the plaintiff in said action, by this plaintiff as his attorney therein, served a written notice of trial of the issue joined in said action for the first Monday of May, 1900, upon the said Sheehan & Collin, Esquires, attorneys for the said defendant therein and herein, The Brooklyn Heights Railroad Company.

Ninth. That on the 22d day of March, 1900, the defendant in said action and herein, The Brooklyn Heights Railroad Company, through the said Sheehan & Collin, Esquires, its attorneys, served upon this plaintiff a counter notice of trial of the issues joined in said action for the Monday of May, 1900.

Tenth. That on the 11th day of April, 1900, this plaintiff, as the attorney for the plaintiff in said action, caused a written note of the issues joined in said action to be filed with the clerk of this court, and then and there caused said issue to be placed upon the general calendar of issues of this court, triable by jury, for said first Monday of May, 1900; that said issue joined in said action was placed upon the general calendar of this court, of issues triable by jury, for said first Monday of May, 1900, as and by the number 6277, and is now awaiting trial by this court and a jury.

Eleventh. On information and belief, that on or about the 20th day of July, 1900, the defendant herein and in said action, The Brooklyn Heights Railroad Company, and the defendant, Louis Olsen, herein, the plaintiff in said action, without any notice whatever to this plaintiff, agreed upon and arranged a money settlement of said action, whereby, in consideration of the execution and delivery by the said Louis Olsen, the plaintiff in said action, to said defendant, The Brooklyn Heights Railroad Company therein, of a release in writing bearing date that day, releasing it, The Brooklyn Heights Railroad Company, of and from all claim and demand whatever, by reason of the cause of action and matters and things set forth in the complaint in said action, said defendant therein and herein, The Brooklyn Heights Railroad Company, agreed to pay to the defendant, Louis Olsen, herein, as plaintiff in said action, the sum of one thousand five hundred dollars (\$1,500).

Twelfth. On information and belief, that on or about the 20th day of July, 1900, said defendant, Louis Olsen, the plaintiff in said action, executed and delivered to the defendant therein and herein, The Brooklyn Heights Railroad Company, a certain release in writing, wherein and whereby said defendant, Louis Olsen, the plaintiff in said action, released said defendant therein and herein, The Brooklyn Heights Railroad Company, of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, accidents, executions, claims and demands whatsoever in law or in equity, which against the defendant in said action, The Brooklyn Heights Railroad Company, the said Louis Olsen, as plaintiff therein, ever had, then had, or which he, the said Louis Olsen, his heirs, executors, or administrators thereafter could, should, or might have, for, upon, or by reason of any matter, cause or thing whatsoever by reason of the cause of action and the matters and things set forth in the complaint in said action hereinbefore referred to. On information and belief, that on or about the said 20th day of July, 1900, said defendant, in said action and herein, The Brooklyn Heights Railroad Company, in consideration of the aforesaid execution and delivery to, in, of said release by Louis Olsen, the plaintiff in said action and a defendant herein, paid over and delivered to said defendant herein, Louis Olsen, the plaintiff in said action, the sum of one thousand five hundred dollars (\$1,500) in full settlement, release and discharge of his said claim and demand for damages in said action. That on said settlement no financial provision was made by said defendants for the satisfaction of this plaintiff's lien upon said retainer and agreement as attorney for the plaintiff in said action.

Thirteenth. That this plaintiff last saw and conversed with said defendant, Louis Olsen, on or about the 13th day of July, 1900, but that on that day, said defendant, Louis Olsen, did not then, nor did he at any time previously or subsequently to said date last named, give this plaintiff any notice whatever, verbal or otherwise, or any idea whatever, that negotiations were pending between himself, the said Louis Olsen, and the said The Brooklyn Heights Railroad Company for a settlement of said action as aforesaid.

Fourteenth. That at all the times hereinbefore mentioned, the defendant herein, Louis Olsen, and the plaintiff in said action was financially irresponsible, save and excepting, only, at the time when he

received from said defendant therein and herein, The Brooklyn Heights Railroad Company, said sum of one thousand five hundred dollars (\$1,500) in full settlement of his said claim and demand for damages in the action above referred to.

Fifteenth. On information and belief, that on or about the 21st day of July, 1900, and since such aforesaid settlement with the defendant, in such action, The Brooklyn Heights Railroad Company, Louis Olsen, who was a Norwegian by birth, and one of the defendants herein and the plaintiff in the action above referred to, without the assent, consent, connivance and procurement of this plaintiff, left the United States of America and returned to the kingdom of Norway, his native land, and that said defendant, Louis Olsen, the plaintiff in said action, is now without the jurisdiction of this court and of the United States of America where he still remains.

Sixteenth. That this plaintiff under his aforesaid written retainer by, and the aforesaid agreement relative to his compensation for services with said defendant, Louis Olsen, the plaintiff in the action above referred to, was at the time of the settlement of said action, and he still is, justly entitled to the sum of seven hundred and fifty dollars (\$750.00) fixed or based upon the amount paid, as aforesaid, by said defendant in said action, and herein, The Brooklyn Heights Railroad Company, to said Louis Olsen, the plaintiff in said action, and one of the defendants herein, in settlement and in release of said action.

Seventeenth. That no part of said sum of seven hundred and fifty dollars (\$750.00), or any other sum whatever in said action hereinbefore referred to, has been paid to this plaintiff by either Louis Olsen, a defendant herein and plaintiff in said action, or The Brooklyn Heights Railroad Company, a defendant herein and in said action above referred to, although payment thereof has been duly demanded and that the sum of seven hundred and fifty dollars (\$750.00) and the further sum of fifty dollars and seventy-five cents (\$50.75), being the costs and disbursements taxable in said action, still remains due and owing by said defendants to said plaintiff.

Eighteenth. That by reason of the matters and things and the premises hereinbefore mentioned and set forth, this plaintiff is entitled to recover of said defendants the sum of seven hundred and fifty dollars (\$750.00) besides the costs and disbursements of said action, taxable at fifty dollars and seventy-five cents (\$50.75).

Nineteenth. That the aforesaid services rendered by this plaintiff, as attorney for Louis Olsen, the plaintiff in said action under his said retainer and agreement, were rendered upon said retainer and agreement, and at the request of and employment by said defendant, Louis Olsen, the plaintiff in said action; and that this plaintiff was the attorney and of counsel of record for the defendant, Louis Olsen, the plaintiff in said action, of which The Brooklyn Heights Railroad Company, the defendant therein and a party defendant herein, and its said attorneys in said action, Sheehan & Collin, Esquires, had due notice.

Twentieth. That at the time or times hereinbefore stated, the defendant, The Brooklyn Heights Railroad Company, then was and it still is, a domestic street surface railroad corporation, duly incorporated under the laws of the State of New York, having an office for the principal transaction of its business at No. 168 Montague Street, in the Borough of Brooklyn, Kings County, in said State of New York.

WHEREFORE, said plaintiff demands judgment:

1. That his lien in the action above referred to, as attorney for Louis Olsen, the plaintiff therein (under section 66 of the Code of Civil Procedure) may be ascertained and foreclosed against said defendants and each of them.

2. That this court will settle and determine the equities of the parties hereto in relation to plaintiff's said lien in the action hereinbefore referred to.

3. That by reason of the foregoing premises, said defendants, or either of them, be adjudged to pay to this plaintiff, upon his said written retainer and agreement with the defendant, Louis Olsen, the plaintiff in the action above referred to, based upon the settlement made by and between the said Louis Olsen, the plaintiff in said action and a defendant herein, and said defendant therein and herein, The Brooklyn Heights Railroad Company, in said action, as aforesaid, the sum of seven hundred and fifty dollars (\$750.00), and the further sum of fifty dollars and seventy-five cents (\$50.75) as and for the taxable costs and disbursements of the plaintiff in said action, amounting together to the sum of eight hundred dollars and seventy-five cents (\$800.75).

4. That this plaintiff may have such other and further relief, or both, in the premises as shall be just and equitable, and that this court will adjudge unto this plaintiff the costs and disbursements of this action against said defendants or either of them.

CARL FISCHER-HANSEN,
Plaintiff, Attorney in Person.

55 Liberty Street, Borough of Manhattan, New York City.
(Add verification.)

ARTICLE IV.

PROCEEDINGS TO COMPEL ATTORNEYS TO PAY OVER MONEYS.

Subd. 1. General powers of the court, 190.

2. When the proceeding can be maintained, 192.

3. Method of procedure (see also "Contempt," Subd. 6, Art. V.), 198.

Subd. 1. General Powers of the Court.

The Court of Chancery had power to make an order upon petition requiring a solicitor to pay over money collected by him; and will on his default entertain an application to commit him or remove him from the office. *Matter of Bleakley*, 5 Paige, 311. It was said, in *Saxton v. Wyckoff*, 6 Paige, 182, that the Supreme Court is competent to give a complainant against an attorney any equitable relief to which he is entitled, and such court is the appropriate tribunal to settle a controversy between an attorney and client in relation to the duties of the attorney as an officer of the court, and therefore an injunction ought not to be granted to compel a defendant in an action for making an application to the court to compel an attorney to pay over moneys received in his professional capacity.

An attachment will issue against an attorney for not paying over money collected for his client. *People v. Smith*, 3 Caines, 221; *People ex rel. Bacon v. Wilson*, 5 Johns. 368.

The theory upon which the proceeding is based is that the attorney is an officer of the court, and in order that the proceeding may lie he must be such officer in respect to the particular wrong which it is sought to repair; and it was at one time held, that where an attorney of the Superior Court of the city of New York, who was also an attorney of the Supreme Court, was retained to defend a suit in the former court, that the Supreme Court had no power to require him to pay over money, but that the matter belonged exclusively to the Superior Court. *Ex parte Ketchum*, 4 Hill, 564.

The provision of the Code of Procedure as to agreements between attorney and client for compensation to the former did not deprive the court of its supervisory power over dealings between attorney and client, and such power will be exercised in a summary way as formerly, to prevent overreaching, oppression, or fraud. *Barry v. Whitney*, 3 Sandf. 696.

Where it appears that an attorney has money belonging to his client collected in a professional capacity which he refuses to pay over, the court will compel him so to do on motion and will not compel the client to resort to an action. *Matter of Mertian*, 29 Hun, 459; *aff'd*, on reargument, 17 Wkly. Dig. 163.

The remedy for an act of the attorney or counsel not consistent with his relation to the court is by a summary proceeding and not by formal action. *Foster v. Townshend*, 2 Abb. N. C. 29, 68 N. Y. 203, *rev'g* 6 Daly, 136, and partially overruling 12 Abb. Pr. N. S. 469. The court has jurisdiction to entertain a summary proceeding by a client against an attorney for misconduct. *Kuhne v. Daley*, 23 Hun, 282.

An attorney may be compelled by summary proceedings to restore money wrongfully collected and retained from his client. *Pritchard v. Marvin*, 33 App. Div. 639, 56 Supp. 974; *aff'd*, 158 N. Y. 667.

The granting of a summary remedy against attorneys is wholly within the discretion of the court. *Matter of Nellis*, 116 App. Div. 94, 101 Supp. 698; *Keeney v. Tredwell*, 71 App. Div. 521, 75 Supp. 1097.

It is in the discretion of the court whether it will proceed by attachment to compel the attorney to pay over money to the client or leave the client to his action, and, therefore, appeal does not lie to the Court of Appeals unless the relief is denied for lack of jurisdiction. *Matter of Schell*, 128 N. Y. 67, 38 St. Rep. 442, *aff'g* 58 Hun, 440, 34 St. Rep. 928, 12 Supp. 790.

The order of a surrogate directing an attorney to deposit money collected for the estate is discretionary and not appealable. *Matter of De Oraindi*, 31 St. Rep. 744, 9 Supp. 873.

Upon a summary application the inquiry is, What money has the attorney received belonging to the client which equity and justice required him to pay over? The proceeding is incident to the equitable powers of the court, and the court should not estop either party by rules of evidence which would prevent the ascertainment of the truth. So held as to the introduction of parol evidence to vary the attorney's receipt. *Purdy v. Stewart*, 16 Wkly. Dig. 284.

An attorney who receives money of his client for which he is liable to account does not escape the summary jurisdiction of the court to compel him to account for and pay over such moneys, by reason of the fact that he is afterward disbarred from practice and his name is stricken from the roll of attorneys. *Matter of Burnham*, 58 Misc. 576, 109 Supp. 988.

Where attorneys receive in their capacity, as such, moneys of a client, they must account to him for all of it except a reasonable sum for counsel fees and disbursements. The right to an accounting will not be denied because of their interposition of technical objections. *Matter of Keen*, 39 Misc. 374, 79 Supp. 857.

Where an attorney kept half of the sum received on the settlement of an action pursuant to his contract of retainer, but upon the client demanding a larger proportion they entered into a stipulation fixing an additional amount which the attorney should turn over, the settlement to be approved by the court, it is not bound by the stipulation but may order the attorney to turn over a larger sum. *Matter of Friedman*, 136 App. Div. 750, 121 Supp. 426.

An executor who has paid his attorneys a sum on account of their services on an accounting proceeding and then changes them and obtains an order substituting other attorneys is not entitled to the summary assistance of the court to compel the former attorneys to repay what had been paid them, or to an order of reference to determine the value of the services already rendered by the attorneys, as such case is not one for the exercise by the court of its supervisory and disciplinary jurisdiction over attorneys. *Matter of Hess*, 133 App. Div. 654, 118 Supp. 171.

Subd. 2. When the Proceeding can be Maintained.

The summary remedy lies only when the money is received by the attorney in a professional capacity, and where a trust arises solely through his relation to his client. *Matter of Husson*, 26

Hun, 130, 62 How Pr. 358. See this case for facts under which it was held that merely the relation of debtor and creditor existed.

Where the employment of an attorney is so connected with his professional character as to afford a presumption that it formed the ground of his employment the court will interfere in a summary way to compel him to execute the trust reposed in him, but where he is employed in a matter wholly unconnected with his professional character the court will remit the party, who alleges that he has been damaged, to his action. *Matter of Hammann*, 37 Misc. 417, 75 Supp. 775.

It has been held, however, that in order to entitle a client to the summary remedy, it is sufficient if the attorney received the money in his professional capacity, and it is not necessary that he should have received it in any particular legal proceeding. *Grant's Case*, 8 Abb. Pr. 357; *Ex parte Staats*, 4 Cow. 76. In *Grant's Case*, *supra*, the attorney received money to invest on bond and mortgage, but did not do so, and upon its appearing that he would not have been so employed if he had not been an attorney, it was held that the summary remedy would lie.

As to what constitutes the relation of attorney and client, see *Matter of Larner*, 20 Wkly. Dig. 73, where it was held that where an attorney was employed to avoid an apprehended procedure for foreclosure of a mortgage, his services were professional services, and that money delivered to him for such purpose was received in a professional capacity. The relation of attorney and client exists where the attorney undertakes to collect a claim upon a contingent fee; such a contract does not show the relation of principal and agent. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219.

Where an attorney purchased property at a sale on his client's execution, and subsequently sold the same at an advanced price, it was held that he could be compelled summarily to pay over the profits to his client, and should be committed to close custody in case of default, and that the amount of such profits could be summarily ascertained by reference. *Matter of Friedman*, 27 Hun, 301.

Where an attorney in a foreclosure action receives his client's surplus moneys and fails to pay the same over to the referee or county treasurer, a summary proceeding by attachment lies. *Matter of Silvernail*, 45 Hun, 575. Where an attorney received money in payment of costs awarded to his client on an erroneous order,

which order was subsequently reversed, and he has never paid such money over to the client, and still has it in his hands, he may be compelled by order to restore the money upon the reversal of the original erroneous order. *Forstman v. Schulting*, 108 N. Y. 110. As to when the conduct of attorneys in refusing to deliver an extension to the mortgage procured for the client does not indicate good faith, and under what circumstances the court will compel such delivery, see *Matter of Robertson v. Clock*, 18 App. Div. 363, 46 Supp. 87, 80 St. Rep. 87.

Though in most cases it is stated that the summary remedy by attachment lies only where the relation of attorney and client exists, it has been held that where an attorney by fraud procures from the court an order by which he obtains money from a party not his client, he may, nevertheless, be proceeded against summarily by attachment. *Wilmerdings v. Fowler*, 14 Abb. Pr. N. S. 249, aff'g 45 How. Pr. 142; s. c., *Fowler v. Lowenstein*, 7 Lans. 167. See, however, 15 Abb. Pr. N. S. 86, where it was held that the fraud in question was not made out. For a case where a motion was made to compel an attorney to pay a check given to an adverse party, see *Wilkinson v. Gill*, 14 Wkly. Dig. 231.

The summary remedy will only be allowed on motion of the client and will not lie on the motion of one who merely advanced money to the attorney for the client. *Hess v. Joseph*, 7 Robt. 609.

It was only where the relation of attorney and client exists that the summary remedy will lie, and there is no such relation between an attorney employed in the prosecution of a case, and other officers of the court, whose services become necessary; and, therefore, the remedy does not lie in favor of such other court officers against the attorney to compel the payment of the court officers' fees. *Lamoreux v. Morris*, 4 How. Pr. 245.

The summary remedy only lies where the relation of attorney and client exists, and does not lie where the relation is merely one of debtor and creditor; and thus where an attorney has collected counsel fees for his counsel such fees cannot be collected by the counsel on summary remedy to the court. *Matter of Haskins*, 18 Hun, 42.

It is only where the money is collected in a professional capacity as attorney that the summary action of the court may be invoked, and though a person be an attorney, if he collect money, or refuse to pay it over in any other than a professional capacity, the summary proceeding does not lie. Thus where an attorney collected

money as a land agent, and received such money in his capacity of land agent, and not as an attorney-at-law, it was held that the attachment could not be sustained, but the client must resort to an action. *Matter of Dakin*, 4 Hill, 42. The mere fact that one is an attorney, and also holds a power of attorney from another to collect amount due on a certificate of a benefit society, does not create relation of attorney and client, so as to support summary proceedings to compel the payment of money collected. *Matter of Hillebrandt*, 33 App. Div. 191, 53 Supp. 353.

For a case where it was held that the summary remedy should be denied and the petitioner left to his action, on the ground that the relation of attorney and client did not exist, see *Matter of Sardy*, 47 St. Rep. 308, 19 Supp. 575. For a case where it was held that the summary remedy did not lie on the ground that the attorney under the circumstances was not authorized to pay over the money, see *Matter of Smyley*, 46 St. Rep. 824, 19 Supp. 266. Where, in a summary proceeding against an attorney, the value of his services is in dispute, and it is conceded that he has performed some services, the court will not summarily order him to surrender to the client securities which are in his hands. *Matter of McKirvin v. Nafis*, 59 St. Rep. 101, 27 Supp. 723.

It is only where the relation of attorney and client exists that a summary proceeding to compel an attorney to pay over moneys may be maintained; hence it cannot be maintained by one attorney to compel him to pay over moneys due him from another attorney. *Matter of Hirschbach*, 72 App. Div. 79, 76 Supp. 117.

It was held, in *Berks v. Hotchkiss*, 82 Hun, 27, 31 Supp. 16, 63 St. Rep. 354, that the General Term would not interfere in a summary manner in quarrels between attorney and client, unless the former had been guilty of such unprofessional and dishonest conduct as to require his disbarment and discipline; for instance, it will not compel him to carry out a stipulation given in consequence of a failure to apply in time, although charges of deception are made. Where a guardian paid for services performed by an attorney for an infant, it was held that if such services were wrongfully charged to the estate, the remedy was by a settlement of the guardian's account, and that the attorney could not be summarily compelled to pay over the money. *Matter of Holland Trust Co.*, 76 Hun, 323, 59 St. Rep. 85, 27 Supp. 687. It was held that the motion to compel the restitution of money received by an adverse attorney, and paid to his client in good faith, should be directed

against such client, and not against the attorney. *Elliott v. King*, 3 Month. Law Bul. 60. See *Sims v. Brown*, 6 T. & C. 5, 64 N. Y. 660.

The pendency of the action against an attorney for moneys withheld, in which action he has been arrested, is sufficient ground for refusing the summary remedy. *Matter of Mott*, 36 Hun, 569. If the client proceeds by action to recover money from an attorney wrongfully withheld, it is a waiver of his rights to proceed by attachment. *Cottrell v. Finlayson*, 4 How. Pr. 242, 2 Code Rep. 116. It has been held, however, in *Gabrial v. Schillinger Fire Proof Cement Co.*, 24 Misc. 313, 52 Supp. 1127, that the bringing of an action at law for the recovery of money from an attorney does not preclude the client from resorting to the summary proceeding, and that where the verdict of a jury established the fact that the attorney received a specified sum from his client to apply to a specific purpose, and failed so to do, the court is warranted in making a summary order for its repayment.

The summary proceeding to compel an attorney to pay over money wrongfully withheld can only be brought by the client, and cannot be brought by an assignee of the client. *Matter of Schell*, 58 Hun, 440, 34 St. Rep. 928, 12 Supp. 790. But see s. c., 128 N. Y. 67; *Bowen v. Smidt*, 49 St. Rep. 647, 20 Supp. 735. For a case where summary proceeding was denied to petitioners who were assignees, see *Matter of Post v. Evarts*, 31 St. Rep. 123, 9 Supp. 370. But where an assignment of a claim was agreed upon pending an action, with knowledge of the attorney, by whose advice a formal assignment was delayed until after judgment, the assignees may maintain summary proceedings to compel the payment of moneys collected on the judgment, because the attorney will be deemed to have prosecuted the action for the benefit of the assignee. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532, aff'g 8 Misc. 511, 59 St. Rep. 407, 28 Supp. 754.

A client who, at the request of his attorney, takes the attorney's promissory notes for moneys which the attorney has collected for him, cannot, in the event of the failure of the attorney to pay the notes at maturity, maintain a summary proceeding to compel the attorney to do so, but will be relegated to an action at law upon the notes. *Matter of Neville*, 71 App. Div. 102, 75 Supp. 588.

A trustee in bankruptcy may make application to the Supreme Court to compel an attorney for the bankrupt to pay over moneys collected by him, and the fact that the attorney remitted his check

for a portion of the moneys collected will not establish an account stated. *Matter of Klein*, 101 Supp. 663.

An attorney who receives money belonging to the lunatic's estate from the committee of the lunatic for safe-keeping will not, after the death of both the lunatic and the committee, be required to pay such money to the lunatic's administrator upon a summary application made by the latter, where the relation of attorney and client did not exist between the attorney and the lunatic, and there is nothing to show whether the committee of the lunatic died intestate or whether she had a personal representative, or whether the estate of the committee, which was not in any way represented in the proceeding, was indebted to the lunatic. *Matter of Redmond*, 54 App. Div. 454, 66 Supp. 782, 8 N. Y. Anno. Cas. 309.

It was held, in *Matter of Förster*, 49 Hun, 114, 17 St. Rep. 115, that the summary proceeding in the State courts is not maintainable to require an attorney to pay over money where the services were rendered as counsel of another court, not a State court, but a court of separate jurisdiction, and it seems also in this same case, in the opinion of Daniels, J., that even if such summary application would be entertained under the circumstances, yet several claimants cannot combine in a single proceeding for such purpose.

It has been held, however, that the court may compel an attorney to pay over moneys, although they were collected upon the settlement of an action in another State. *Matter of Batterson v. Osborne*, 44 St. Rep. 837, 18 Supp. 431.

An agreement between an attorney and client by which the former is to be paid one-half of any money that should be obtained in a litigation about to be instituted, out of which amount he agrees to compensate an attorney associated with him in the case, is not champertous within the meaning of section 74 of the Code of Civil Procedure.

The mere fact that the attorney was to receive one-half of the recovery does not render the agreement unconscionable in the absence of proof that it was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain an improper or undue advantage.

So held on appeal from an order reversing an order of the New York county Surrogate's Court, and dismissing the appellant's proceeding to establish and enforce an attorney's lien and denying him the relief prayed for in his petition. *Matter of Fitzsimons*, 174 N. Y. 15, rev'g 77 App. Div. 345, 79 Supp. 194.

In a summary proceeding to compel an attorney to pay over money received in his professional capacity, where the issue is as to whether the moneys were not received as a general agent for the petitioner, even a stipulation by the parties that the court hear and pass upon all the differences between the parties will only authorize the court to fix the amount due and not to direct its payment by an order, a breach of which would be punishable as a contempt. *Matter of Langslow*, 167 N. Y. 314, modif'g judgment, 52 App. Div. 635, 66 Supp. 1135.

A summary proceeding is not the proper remedy to compel one attorney to pay over money extorted by him from another attorney. *Matter of Cattus*, 42 App. Div. 134, 59 Supp. 55.

An attorney receiving costs from a partner, who is afterward obliged to pay them to his client, will not be ordered to repay them on a summary application. *Taylor v. Long Island R. R. Co.*, 38 App. Div. 595, 56 Supp. 665.

Where the court at Special Term entertained a summary proceeding to compel an attorney to pay over moneys to a client on the erroneous supposition that the attorneys had made no request that the petitioner be remitted to an action at law, it was held that the summary proceeding should be dismissed without costs, and without prejudice to the petitioner's right to proceed by action. *Matter of Pollock*, 69 App. Div. 499, 74 Supp. 976

Subd. 3. Method of Procedure. See also Contempt, Art. 5, Subd. 6.

An attachment is a proper remedy against an attorney who retains money, and refuses to pay over, that justly belongs to his client, and good faith in withholding the money is no ground for exemption from such remedy. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489.

Where an attorney has acted in a way inconsistent with his relation to the court and suitors have sustained damage, the remedy is by summary proceeding and not by action. *Foster v. Townshend*, 68 N. Y. 203.

It seems that in the Second Judicial Department the court will not summarily adjust a dispute between an attorney and the client but will remit the aggrieved party to his action. *Arone v. Lauanders*, 43 Misc. 138, 88 Supp. 259.

In *Rose v. Whitman*, 52 Misc. 210, 101 Supp. 1024, the court discusses the remedies which may be taken by a client as against an attorney who wrongfully withholds moneys.

The client brought an action against an attorney for an alleged conversion of moneys upon which the attorney claimed a lien. It was held that the action would not lie until there had been an accounting and the amount due the attorney from the client had been ascertained; that the plaintiff mistook her remedy, and that she should have applied to the court for an order requiring the defendant to show cause why he should not pay over any moneys belonging to her which were wrongfully withheld. On the return of such order the court had the power to appoint a referee to take proof of such facts, and if the referee's report shows any moneys in the hands of the attorney belonging to plaintiff, in excess of what they were entitled to for services, the court could on confirmation of the report summarily direct the attorney to pay over such moneys, and if he failed to do so he could be proceeded against by attachment as for a contempt. Or the client could commence an action for an accounting, and if it was ascertained on the trial that any sum of money was in the hands of the defendants belonging to the plaintiff over and above their reasonable charges, then an action for conversion could have been maintained. But that said action could not be maintained so long as the amount of compensation was in dispute.

Where parties have been injured by the misconduct of attorneys in an action, an application for a summary remedy should be to the court in which the judgment was recovered. *Weidersum v. Naumann*, 10 Abb. N. C. 149. It was held, in *Grangier v. Hughes*, 56 Super. Ct. 346, 3 Supp. 828, that the summary remedy to compel an attorney to pay over moneys should be made in an action in which the misconduct was committed, and not in an action against the attorney to recover for the misconduct; and in this case it was held, also, that if the attorney fails to object to the maintenance of the proceedings, or to an order of reference until such time when an action by a client will be barred by the Statute of Limitations, the court will not dismiss the proceedings or remit the petitioner to his action, nor will the fact that the attorney retained the money in good faith in settlement of the controversy as to his right to retain it be a legal answer to the summary application. The Statute of Limitations applies in a summary proceeding for the payment of moneys by an attorney, because such proceeding is a civil remedy, and in order to succeed therein a legal right must be established. *People v. Brotherson*, 36 Barb. 662; *Van Tassel v. Van Tassel*, 31 Barb. 439. Compare, however, *Grangier v. Hughes*, 3 Supp. 828, 56

Super. Ct. 346. In a summary proceeding to compel the payment of money by an attorney, who has submitted to the jurisdiction of the court, the latter cannot subsequently object that the court had no jurisdiction in the summary application. *Yates v. Heath*, 23 St. Rep. 362.

Upon a summary proceeding to compel an attorney to pay over moneys collected in his professional capacity, the fact that the attorney in good faith claims a lien upon the fund for services does not entitle the attorney as a matter of right to a trial by jury; but the court may order a reference as to the extent of the claim, and upon the confirmation of the report of such referee showing the balance due the client, the attorney will be ordered to pay it over. *Matter of Fincke*, 6 Daly, 111.

If an attorney retain money collected on his client's judgment in good faith, and under the supposition that he is entitled thereto under his special contract for services, the court may, nevertheless, summarily order him to pay over such money, although it will consider the circumstances of the case in determining whether the question should be decided summarily. *Matter of Chittenden*, 4 St. Rep. 606; aff'd without opinion, 105 N. Y. 679.

An attorney should not be allowed to retain his client's money for what appeared to be excessive charges, when the only evidence to support such charges is his opinion that they were fair. He should be required to produce legal evidence upon the question of the value and the necessity of the services. *Matter of Raby*, 25 Misc. 240, 55 Supp. 87, 89 St. Rep. 87. On a summary application where the attorney is shown to be in possession of his client's money and was called upon to account, he is bound to show in detail what he has done with it and to justify its expenditure or retention. *Matter of Raby*, 29 App. Div. 225, 51 Supp. 552. Where moneys were recovered for the client, and the attorney directed a referee to pay the sum to one to whom the attorney was indebted, the attorney cannot claim that he has not received such moneys on a summary application by the client to compel him to pay over. *Kent v. Rockwell*, 89 Hun, 88, 34 Supp. 1041, 69 St. Rep. 13. If, on a reference in a summary proceeding, the attorney sustain a claim to an unliquidated amount due him for services, it is improper to charge him with interest on the balance prior to the commencement of the proceeding. *Grangier v. Hughes*, 56 Super. Ct. 346, 3 Supp. 828. It was held in *Matter of Post v. Evarts*, 31 St. Rep. 123, 9 Supp. 370,

that an order for the payment of money on a summary application could not be granted, unless the claim of the petitioners is free from every reasonable doubt.

In *Sackett v. Breen*, 3 Supp. 473, it was held that an action was the proper remedy for the recovery of money by a client wrongfully withheld by an attorney where there is a dispute as to the proper deduction for the attorney's services. It is no answer to a summary application to set up a lien for services. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532, aff'g 8 Misc. 511, 59 St. Rep. 407, 28 Supp. 754. In order to prevent the giving of summary relief by the court, where an attorney asserts a counterclaim, such assertion must be shown sufficiently to justify a formal investigation thereof. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219; aff'd, 149 N. Y. 608. Where an attorney collected money under an agreement to retain 25 per cent. for his services, he may be ordered summarily to pay over the balance. *Matter of Sprague v. Horton*, 46 St. Rep. 17, 18 Supp. 165. If an attorney collects the claim on instalments he may be compelled to pay over the collections as they are made, and is only entitled to his percentage from the cash actually collected. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219; aff'd, 149 N. Y. 608.

The papers in a motion to compel an attorney to pay over should not be entitled in the action. *Hess v. Joseph*, 7 Robt. 609. If a firm appears as attorney in an action, it is not necessary to join all the members of the firm in a proceeding to compel the payment of money to the client, where it appeared that the attorney proceeded against personally received the money and appropriated it to his own personal use. *Matter of Wolfe*, 51 Hun, 407, 21 St. Rep. 224, 4 Supp. 239.

Before a client can have the summary remedy of attachment a demand is necessary. *Ex parte Ferguson*, 6 Cow. 596; *Cottrell v. Finlayson*, 4 How. Pr. 242, 2 Code Rep. 116. If an attorney withholds money wrongfully a demand is sufficient to support a summary remedy, even though the demand be for too much, where the attorney refuses to pay over any of the money. *Matter of Ackerman v. Wagner*, 29 St. Rep. 166, 8 Supp. 457, 5 Silvernail, 443.

If upon a summary proceeding there is a disputed question of fact between the attorney and his client as to the existence of a special agreement fixing the attorney's rate of compensation, the court has power to determine such question of fact. *Porter v.*

Parmly, 39 Super Ct. 219; *Matter of Fieldman*, 27 Hun, 301. Questions relating to an attorney's lien, etc., may, in a summary proceeding, be determined by reference. *Brown v. Mayor of New York*, 11 Hun, 21. But see *Matter of Yenni*, 2 Month. Law Bul. 2, where it was *held*, that where the facts as to a contract for services are disputed, the court may leave the client to an action. For a discussion of the power of the court to determine facts upon a reference in this summary proceeding, and a determination as to the amount due under the circumstances, see *Matter of Knapp*, 85 N. Y. 284, rev'g 8 Abb. N. C. 308. While the court may order a reference, if there is a dispute as to the facts of the sum due, yet, where the value of the attorney's services can be readily ascertained, it is proper for the court to decide the value and order the attorney to pay over the remainder without sending the matter to a referee, or compelling the petitioner to resort to an action. *Waterbury v. Eldridge*, 5 Supp. 324. In a proceeding to compel an attorney to deliver papers, the proper course is to direct a reference to surrender the amount due, where it appears that there is still due the attorney an indefinite amount. *Matter of Taylor Iron & Steel Co. v. Higgins*, 49 St. Rep. 645, 20 Supp. 960. A reference may be ordered in the summary proceeding to compel an attorney to pay over money to the client. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532. But where it appears that an attorney has rendered an itemized bill and that it has been paid, there is no occasion for the reference, and he should be required summarily to pay over moneys due. *Matter of Waterbury v. Eldridge*, 24 St. Rep. 429, 5 Supp. 324, 1 Silvernail, 292. Where on a summary motion there is no dispute as to what services the attorney actually performed, a reference or trial is unnecessary, for the court has only to fix a reasonable amount of compensation for such services. *Ferdon v. Ferdon*, 1 App. Div. 629, 36 Supp. 741, 71 St. Rep. 671. Even if the affidavits by an attorney in a summary proceeding are evasive and unsatisfactory they cannot be disregarded, and if they present an issue as to the capacity in which he acted, or as to the existence or extent of a lien upon the funds, it is the duty of the court to institute an inquiry by reference and not to assume that there has been professional misconduct, solely because the attorney's affidavit is distrustful. *Matter of H., an Attorney*, 87 N. Y. 521, 63 How. Pr. 152.

Where upon a motion to compel an attorney to pay over to his client a sum of money collected by the attorney for the client it

appears that the attorney's defense to the proceeding is based upon the contention that a contract, by which the client agreed to pay the attorney a specific sum for services, covered only a portion of the services rendered by the attorney, and the papers used upon the motion present a sharp question of fact as to whether the attorney's contention is correct, the court should not dismiss the proceedings upon the motion papers but should take proof upon the subject or order a reference. *Matter of Martin*, 73 App. Div. 505, 77 Supp. 192.

The court cannot properly order a reference to determine in a summary manner conflicting claims of plaintiff's attorney and others to the amount of the judgment under several assignments made by the plaintiff to them. *Hexter v. Pennsylvania R. R. Co.*, 43 App. Div. 113, 59 Supp. 453.

A reference should not be ordered on a petition of a client against an attorney where the facts are in small compass and not complicated. *Weiss v. Schleimer*, 86 App. Div. 611, 83 Supp. 234.

Where the petitioner alleged that the attorney had offered his services as attorney and it appeared that the latter had given the petitioner a receipt for a payment in advance of services containing the word "retainer," the court considered it a case for summary relief but, upon a sharp conflict as to facts, ordered a reference to have them reported in aid of its conscience, and this in view of the rule that upon a summary application to make an attorney pay over moneys he is entitled to have a clear case made out against him. *Matter of Hammann*, 37 Misc. 417, 75 Supp. 775.

Upon an application to compel an attorney to pay over a sum of money collected by him to his client, the attorney who has submitted to the Special Term to determine the amount to which he is entitled cannot, on appeal from the order entered, raise the objection that a reference should have been ordered, the facts having been before the court which disposed of the matter on the motion. *Matter of Borkstrom*, 63 App. Div. 7, 71 Supp. 451; judgment aff'd, 168 N. Y. 639.

After entry of judgment against plaintiffs dismissing the complaint they moved for an order substituting a new attorney, there being a dispute as to the amount due the original attorney, the order of substitution directed the appointment of a referee to take proof as to the amount due him and report to the court. An order made on the report of the referee required the plaintiffs to pay to him within thirty days the amount due him, with fees and expenses

of the referee. It was *held*, that the plaintiffs, having invoked the jurisdiction of the court and accepted the order of substitution containing provision for a reference, were bound by the order; that it was doubtful whether the court had authority to punish plaintiffs in the event of their failure to pay the money required by the order as for a contempt. *Kane v. Rose*, 87 App. Div. 101, 84 Supp. 111; *aff'd*, 177 N. Y. 557.

In an action by a client against his attorney to recover a certain sum intrusted to him for a specific purpose, the burden of proof is upon the attorney to show that his dealings with plaintiff have been just and fair, and where the defendant, while denying the allegations of the complaint that said money was never used for the purpose for which it was given and that plaintiff was entitled to its return, offers no testimony, it is reversible error to dismiss the complaint for failure of proof. *Purdy v. Wallace*, 47 Misc. 163, 93 Supp. 608.

A reference had in a summary proceeding to compel an attorney to pay over moneys to a client is for the purpose of informing the conscience of the court, and the latter may adopt or disregard the report of the referee. The report, however, is entitled to consideration by reason of the fact that the referee saw and heard the witness.

A referee ordered to report the evidence with his opinion is not bound to take irrelevant testimony; *contra*, if he be ordered to take testimony only.

The requirement of section 1022 of the Code of Civil Procedure, that the referee separately state and number the facts found and conclusions of law, does not apply to a summary proceeding to compel an attorney to pay over moneys to his client.

A question put to an attorney upon application to compel him to pay over moneys, as to whether other claimants were making claims against him for moneys collected and not reported, is incompetent. *Matter of Jones & Co.*, 117 App. Div. 775.

In a summary proceeding on a petition of a client to compel an attorney to pay over moneys the court must determine the controversy and a reference is merely for the purpose of assisting the court. Such referee has no power to hear and determine, and even when by error authorized to determine no judgment can be entered except by direction of the court. Section 1228 of the Code of Civil Procedure, providing for the entry of judgment upon the report of a referee, has no application to such special proceeding. *Matter of Cartier v. Spooner*, 118 App. Div. 342, 103 Supp. 505.

A referee's finding, upon conflicting evidence, in a summary proceeding to compel the payment of money collected by an attorney-at-law, that the latter has no money of the petitioner which came to him as attorney, and that the only money in his hands belonging to her came to him as her business agent, adopted by the Special Term and affirmed by the Appellate Division, is conclusive in the Court of Appeals.

A stipulation in the proceeding providing for the amendment of an order of reference so as to include also the determination of the differences between the parties as to moneys in the attorney's hands as a business agent, and authorizing the court upon the confirmation of the referee's report to enter a decree ordering him to pay over any amount found due, is binding upon him in his character as business agent only to the extent of the determination of the amount due, since the court, having no jurisdiction to compel by order instead of judgment and execution the payment of moneys in his hands as agent, cannot, even with his consent, acquire such jurisdiction which would make him subject to imprisonment without bail for contempt if he failed to obey the order. *Matter of Langslow*, 167 N. Y. 314; modif'g 52 App. Div. 635.

Where an attorney collects over \$2,000 for a client and retains, without the consent of the client, one-half of that sum in satisfaction of his charge for services and disbursements, a motion to compel him to pay to his client the amount so retained should be granted, to the extent of ordering a reference to determine what amount, if any, is due to the client.

Semble, that before the attorney will be permitted to retain such money, he must show the services and disbursements in detail and establish the reasonableness of his charge by evidence sufficient to justify a finding by a court or jury to that effect. *Matter of Ernst*, 54 App. Div. 363, 66 Supp. 620.

An order appointing a referee to take proof in a proceeding instituted to compel an attorney-at-law to pay over certain funds alleged to have been received by him in a professional capacity should not be granted upon a petition, all the material averments of which are stated to be upon information and belief, signed by a person who describes himself as "Attorney for the Petitioners" and verified by him upon information and belief, the grounds of which information and belief are stated to be conversations and correspondence had with one of the petitioners, where the only reason given for the failure of the petitioners to verify the petition is that

both of them are residents of the State of Connecticut. *Matter of Curtis*, 51 App. Div. 434, 64 Supp. 691.

Upon summary application against an attorney to compel him to pay over moneys alleged to have been unlawfully retained by him, he is entitled to have a clear case made out against him.

Where it appears that an attorney retains his client's money claiming a lien thereon, and upon the facts stated the right is clear and only the amount in question, the court has jurisdiction to determine that question, on application to compel the payment of the moneys retained, although the items of the attorney's account are such as in ordinary cases would subject them to taxation. *Matter of Knapp*, 85 N. Y. 284.

The court has authority at common law, upon application of the client, to inquire into the alleged misconduct of an attorney, and may exercise this right by an order to show cause based on affidavits or petition. The provisions of the Code regulate the authority and dictate the manner of its exercise. Where upon such inquiry the court has ascertained that the attorney has moneys belonging to his client and has ascertained its amount and made an order directing its payment, and a copy of the order has been served upon the attorney and payment demanded, the attorney is guilty of contempt of court in refusing to obey the order but he is not guilty of contempt until the order has been served and payment demanded. Where a proceeding is instituted against a party charged with contempt by affidavit and attachment, and he is adjudged in contempt, a warrant must issue under section 2281; but where the proceeding is begun by an affidavit and order to show cause the offender may be committed by a certified copy of an order so made as prescribed by section 2283. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 Supp. 700.

If an attorney fails to pay over the money to his client he is punishable as for a contempt of court. *Matter of Steneirt*, 24 Hun, 246. If an attorney be ordered to pay over money to his client in a particular manner, and refuse, he is guilty of a contempt. *Matter of McBride*, 6 App. Div. 376, 39 Supp. 579. Where an order has once been made requiring an attorney to pay money to his client, he cannot question the order collaterally in a proceeding to punish him for contempt in disobeying the order. *Matter of Bornemann*, 6 App. Div. 524, 39 Supp. 686.

Precedents in Proceeding to Compel Attorney to Pay Over Money (Matter of Borkstrom, 54 App. Div. 7).

Petition.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE APPLICATION OF
OSCAR G. BORKSTROM, To COMPEL JOHN
DOE, AN ATTORNEY-AT-LAW OF THE STATE
OF NEW YORK, TO PAY OVER CERTAIN
MONEYS.

To the New York Supreme Court:

The petition of Oscar G. Borkstrom respectfully shows:

First: That your petitioner resides at No. 504 East 119th street, in the Borough of Manhattan, New York City, and is the petitioner herein.

Second: That on or about August 31, 1900, your petitioner retained one John Doe, an attorney and counselor-at-law of the State of New York, to institute and prosecute an action, by your petitioner as plaintiff, against Michael Cooper and others, as defendants, for the foreclosure of a mechanic's lien against the said defendants; that said action was duly commenced by the filing of a notice of pendency of action and a summons and complaint, dated on or about September 10, 1900; that issue was joined in said action and that said action came on for trial and was tried before Hon. Alden Chester, Justice, at a Special Term of this court, held at Part VI., on February 15, 18, and 19, 1901; that a decision in said action was thereafter duly rendered therein in petitioner's favor, and a judgment was thereafter and on or about April 8, 1901, duly entered thereon in favor of said plaintiff, your petitioner, against the defendants therein for the sum of one thousand five hundred and thirteen dollars and sixteen cents (\$1,513.16), principal and interest, and three hundred and ninety-nine dollars and thirty-two cents (\$399.32) costs, making a total of one thousand nine hundred and twelve dollars and forty-eight cents (\$1,912.48); that in said bill of costs of three hundred and ninety-nine dollars and thirty-two cents (\$399.32) is included the sum of seventy-nine dollars (\$79) paid by your petitioner to said John Doe for a copy of the stenographer's minutes upon said trial, which said sum of seventy-nine dollars (\$79) the said John Doe agreed to repay to your petitioner out of his bill of costs.

Third: That on or about said August 31, 1900, when your petitioner retained said John Doe to institute and prosecute this said action and foreclose the said mechanic's lien, the said John Doe expressly agreed with your petitioner to institute and prosecute said action and to foreclose the said lien for the sum of fifty dollars (\$50) and the costs he might obtain in said action; that at said time your petitioner paid the said John Doe the said sum of fifty dollars (\$50), and received from him a receipt therefor, of which the following is a copy:

JOHN DOE, Counsellor at Law, 198 East 121st St.

NEW YORK, August 31, 1900.

Received the sum of fifty dollars (\$50) from O. G. Borkstrom in full payment of all services and fees in case of *Borkstrom v. Cooper*, foreclosure of mechanic's lien.

JOHN DOE.

That in addition to the said sum of fifty dollars (\$50) which your petitioner has paid the said John Doe, as aforesaid, your petitioner has also paid the disbursements of said action, amounting to about the sum of thirty-two dollars (\$32).

Fourth: That on or about April 17, 1901, your petitioner was informed by the said John Doe that he, the said John Doe, had settled said judgment and collected the money thereon; that at said time, your petitioner demanded of the said John Doe that he pay your petitioner the moneys due your petitioner upon said judgment, namely, the sum of one thousand five hundred and thirteen dollars and sixteen cents (\$1,513.16), the amount of principal and interest of said judgment, and the further sum of seventy-nine dollars (\$79), the amount paid by your petitioner for the said copy of said stenographer's minutes, making in all the sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16), but that the said John Doe then and there refused and still refuses and neglects to pay over to your petitioner this said sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16), but continues to wrongfully and fraudulently keep and withhold this said sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16) which belongs to and is the property of your petitioner, and refuses to pay over the same to your petitioner.

Fifth: Your petitioner further states that he has personally examined the judgment-roll in this action, and, among other things, finds on file therewith a satisfaction of this said judgment, executed by the said John Doe, as attorney, and acknowledged on or about April 10, 1901; and that no previous application has been made for this order.

WHEREFORE, your petitioner prays for an order directing the said John Doe to show cause why he should not pay over to your petitioner forthwith this said sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16) which rightfully belongs to your petitioner, but is wrongfully withheld from your petitioner by the said John Doe, and in default thereof, why he should not be punished as for a contempt of court, and for such other and further relief, as may be just, together with the costs of this proceeding.

Dated, *April 24, 1901.*
(Verification.)

OSCAR G. BORKSTROM,
Petitioner.

(Same title.)

Order to Show Cause.

Upon recording the petition of Oscar G. Borkstrom, verified April 24, 1901, hereto annexed, and upon the judgment roll duly entered and filed in the office of the Clerk of New York County, on or about April 8, 1901, in the action brought in the New York Supreme Court, New York County, by said Oscar G. Borkstrom, as plaintiff, against Michael Cooper and others, as defendants, and upon all the papers and proceedings in said action, it is

Ordered, that John Doe, attorney-at-law, of the State of New York, show cause before one of the justices of the New York Supreme Court, at a Special Term, to be held at Part II. thereof, in the County Court House, in the County of New York, State of New York, on the 29th day of April, 1901, at 10.30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard why an order should not be granted and entered herein, directing the said John Doe to forthwith

pay over to the said Oscar G. Borkstrom, the sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16), moneys collected by the said John Doe in the aforesaid action, but belonging to the said Oscar G. Borkstrom, and wrongfully and fraudulently withheld and kept by the said John Doe, and in default thereof, directing that the said John Doe be punished as for a contempt of court, and for such other and further relief as may be just and proper, together with the costs of this motion and proceeding.

Service of a copy of this order and petition shall be made upon the said John Doe, on or before the 25th day of April, 1901.

Dated, *April 24*, 1901.

GEORGE P. ANDREWS,

Justice Supreme Court.

(Followed by answering affidavits of John Doe and others in support thereof and affidavit of Oscar G. Borkstrom in reply thereto.)

Order Directing Payment of Moneys.

At a Special Term of the New York Supreme Court, Part II. thereof, held at the County Court House, in the County of New York, on the 6th day of May, 1901.

Present, Hon. JAMES A. O'GORMAN, *Justice*.

(Same title.)

An order having been duly granted herein on April 24, 1901, upon the papers therein recited, directing the said John Doe to show cause before this Court on April 29, 1901, why an order should not be granted and entered herein directing the said John Doe to forthwith pay over to the said Oscar G. Borkstrom the sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16), moneys collected by the said John Doe upon the judgment duly entered in the office of the Clerk of New York County on or about April 8, 1901, in the action brought in the New York Supreme Court, New York County, by the said Oscar G. Borkstrom, plaintiff, against Michael Cooper and others, defendants, and, in default thereof, directing that the said John Doe be punished as for a contempt of court; and said motion coming on to be heard on said 29th day of April, 1901, and after hearing Jesse Grant Roe, attorney for the petitioner herein, in support of said motion, and John Doe, the respondent herein, in person, in opposition thereto and due deliberation having been had thereon, and the Court having thereafter duly rendered a decision herein granting the said motion, with ten dollars (\$10) costs:

Now, upon reading and filing the said order to show cause, granted herein April 24, 1901, and the petition of Oscar G. Borkstrom, verified April 24, 1901, and proof of the due service of a copy of said papers upon the said John Doe.

(Here follow recitals.)

In opposition thereto, and upon all the papers and proceedings herein, and upon motion of Jesse Grant Roe, attorney for said petitioner, it is

Ordered, that the said motion be and the same hereby is granted, with ten dollars (\$10) costs of said motion.

And it is further ordered that the said John Doe forthwith pay over to the said Oscar G. Borkstrom the sum of one thousand five hundred and ninety-two dollars and sixteen cents (\$1,592.16), moneys collected by the said John Doe in the aforesaid mentioned action, but belonging

to the said Oscar G. Borkstrom and wrongfully and fraudulently withheld and kept by the said John Doe, and that in case of his failure to forthwith pay over said moneys to the said Oscar G. Borkstrom, the said John Doe be forthwith punished as for a contempt of court.

JAMES A. O'GORMAN,
Justice Supreme Court.

ARTICLE V.

SUBSTITUTION OF ATTORNEY. SUPREME COURT RULE X; COURT OF APPEALS RULE III; CODE, SECTION 65.

Subd. 1. Right of party to substitution and terms on which granted. Supreme Court Rule X., 210.

Subd. 2. Authority of attorney after judgment, 219.

Subd. 3. Substitution on appeal to Court of Appeals. Rule III, Court of Appeals, 221.

Subd. 4. Substitution on death or disability of attorney, 221.

§ 65 Code. *Death or disability of attorney; proceedings thereupon, 221.*

Subd. 1. Rights of Party to Substitution and Terms on Which Granted (Supreme Court Rule X).

Rule X, Supreme Court. Change of attorneys.

An attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise.

An application for a substitution of attorneys involves no question in the action and is in no sense a proceeding in the action, but is a special proceeding. *Matter of Barkley*, 42 App. Div. 597, citing *Hess v. Joseph*, 7 Robt. 609; *Matter of Doyle v. The Mayor*, 26 Misc. 61.

A proceeding for the substitution of attorneys is a special proceeding which terminates in an order, and no formal judgment can be entered as the result of the determination expressed in that order. *Fenlon v. Paillard*, 46 Misc. 151, 93 Supp. 1101.

An application by a client to change his attorney is not a motion in an action but a summary special proceeding addressed to the discretion of the court. A reference ordered thereunder is deemed one made under section 827, and not under section 1075 of the Code. *Matter of Doyle v. The Mayor*, 26 Misc. 61.

The Supreme Court has jurisdiction to determine controversies arising out of the professional relations of attorneys and clients and upon what terms attorneys shall be changed in pending actions, either upon motion or in a summary special proceeding. *Matter of Barkley*, 42 App. Div. 597.

Matter of Barkley further holds that a determination upon a motion or special proceeding, after hearing all the contestants, is as final and conclusive on the litigants and their privies as though the

same question had been determined in an action; although this rule does not apply to interlocutory orders made during the progress of an action involving some matter or question incidentally arising and not involving the merits of the controversy.

Where, on a motion for substitution of attorneys, the attorney originally retained asserted a lien upon the papers for services rendered in the action and in other matters, and the court ordered a reference to determine the amount due, it is improper before the hearing to require the attorney to furnish a bill of particulars of his claim. *Dacey v. Fogel*, 144 App. Div. 160.

Before another attorney can be heard in the case there must be a regular substitution of record. *Supervisors v. Brodhead*, 44 How. Pr. 426.

A party cannot change his attorney without leave of the court or of a judge thereof. *Krekeler v. Thaulé*, 49 How. Pr. 138; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336.

At any point in a suit or proceeding a client may arbitrarily change his attorneys, subject to the payment or the securing of the fees of his former attorneys, provided their conduct has not been improper or neglectful. *O'Sullivan v. Metropolitan Co.*, 39 Misc. 268, 79 Supp. 481.

A client may change his attorney at will. An attorney having a contract with a client giving him a contingent fee holds the same subject to the rule that the client may supersede him at will, and the contract gives him no lien for services not performed. *Johnson v. Ravitch*, 113 App. Div. 810, 99 Supp. 1059.

A client should not be allowed to change his attorney when the effect of the change will be to bargain away the rights of the other persons who are interested in the action and for whose benefit as well as for that of plaintiff's the action was brought. *Hirshfield v. Bopp*, 5 App. Div. 202, 39 Supp. 24.

Where a mother engages an attorney to prosecute her claim for damages for injuries to an infant son for a contingent fee, thereafter in an action when the mother has been appointed guardian *ad litem*, she is entitled to have another attorney substituted. *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 Supp. 308.

While the successor to the Attorney-General need not be substituted in an action brought by his predecessor (*People ex rel. Larnier v. Carson*, 78 Hun, 544, 61 St. Rep. 161), this rule does not apply to a municipal corporation having counsel appointed for a given period of time. In such case substitution must be made. *Parker v. City of Williamsburg*, 13 How. 250.

A substitution is not required where one of a law firm takes a public office which disqualifies him, where he did not afterward take any part in the action. *Cronin v. O'Reiley*, 26 St. Rep. 249.

A client has the right to change his attorney without assigning a cause, and the only question before the court on such motion is whether the order should be conditioned upon the plaintiff's paying or securing payment of his attorney's fees. A substitution of attorneys for the purpose of discontinuing an action for partition should not be conditioned on the payment of the attorney's fees, where he has done nothing except to have a guardian *ad litem* and referee appointed, and it appears that the action cannot be prosecuted because the whereabouts of the life tenant is unknown and it is impossible to obtain the consent prescribed by section 1533 of the Code of Civil Procedure. *Jeny v. Merkle*, 128 App. Div. 833, 112 Supp. 1106.

Where attorneys dissolve their partnership a firm client has a right to determine which partner shall continue the conduct of an action already begun for him by the firm, provided, however, that the existing lien of the firm is preserved; and, therefore, where one of two partners, upon a consent signed by the client and by that partner of his own motion in the firm name, procured an order merely substituting himself as sole attorney, the court regarded the order duly obtained, but amended it by adding a provision that it was without prejudice to any lien of the firm attaching at the date of the substitution to the cause of action set forth in the complaint. *Schneible v. Travelers' Ins. Co.*, 36 Misc. 522, 73 Supp. 955.

The attorney for defendant procured a verdict which was set aside on appeal, and thereupon refused to act upon the second trial unless paid for his services; the case was tried by other counsel who secured another verdict, and defendant moved for a substitution of attorneys in order to enter judgment and tax the costs of the two trials. The attorney having lost any lien which he might have had on any judgment ultimately obtained, *held*, that the motion for substitution should be unconditionally granted. *Fargo v. Paul*, 35 Misc. 568, 72 Supp. 21.

Where the trial court, on application of defendant for removal of his attorneys, ordered a reference to ascertain the amount of fees due them, and it was shown that some of the actions in which they were retained would be reached for trial before the referee's decision could be given, a substitution of attorneys with an order directing transfer of papers should be ordered on defendant's giving

bond for payment of the amount which should be found due. *Yuengling v. Betz*, 58 App. Div. 8, 68 Supp. 574.

A party has no right, without showing any cause except his own will, to substitute one attorney for another without the payment of the costs earned. And this rule applies to a board of supervisors.

Where a board of supervisors, by their vote, discharge a firm of attorneys who have been acting in their employ (so far as their vote can discharge them) merely because the supervisors choose so to do with a view to substitute another attorney for the board, they must pay the firm of attorneys their reasonable claims, which may be ascertained by a reference. And the attorneys are not bound to consent to a substitution or to deliver the papers upon which they have a lien until the amount of their just demands is ascertained by the court or a referee, and paid them. *Board of Supervisors v. Brodhead*, 44 How. Pr. 411.

Where attorneys are employed to procure an award in condemnation, for a certain percentage, and the substitution of attorneys is ordered at the request of the client before the award is made, and the order therefor gives the attorneys a lien on the award for the agreed percentage, and authorizes a reference to determine the amount due them under their agreements, the referee has no jurisdiction to disregard the contract, and to find a personal liability against the client on a *quantum meruit*, on the ground of the client's breach of contract. *Matter of Department of Public Works*, 58 App. Div. 459, 69 Supp. 413, modified 167 N. Y. 501; *Hynes v. Hawes*, 167 N. Y. 501.

Where the cause of action was for negligence and damages the court, in discontinuing a similar action begun for the client by the original attorneys, secured them out of any recovery he might ultimately obtain in the new action. *O'Sullivan v. Metropolitan St. R. Co.*, 39 Misc. 268, 79 Supp. 481.

The court has power, on ordering a substitution of attorneys, to insert in the order a condition that the lien of the former attorney and his contract with the plaintiff therefor shall not be impaired, but remain in full force. *Jeffards v. Brooklyn Heights R. R. Co.*, 49 App. Div. 45, 63 Supp. 530.

A motion for the substitution of an attorney without alleging any misconduct on the part of the former attorney should not be granted unconditionally, leaving the latter to an action for his fees, but the court should see that his rights are protected in the order of substitution. Where, however, the motion was denied and there

were no affidavits showing the amount of the attorney's claim, *held* that the order should be reversed and the matter remitted to the Special Term for the purpose of ascertaining the amount, and directing a substitution upon its payment or giving security therefor. *Matter of Mitchell*, 57 App. Div. 22, 67 Supp. 961.

Upon application for a substitution ordinarily the court will see that the original attorney is protected as to his fees, but where the attorney's conduct has been improper and neglectful the court will deny its protection and direct an unconditional substitution, leaving the attorney to his action for his fees. *Matter of Prospect Avenue*, 85 Hun, 257; followed, *Sheldon v. Mott*, 91 Hun, 637.

The lien of an attorney upon substitution should be restricted to the papers in his hands, and cannot be extended to all the real and personal property of the client involved in pending lawsuits in charge of the attorney. *Hinman v. Devlin*, 40 App. Div. 234, 57 Supp. 1037.

In a proceeding for the substitution of an attorney there is no error in moving to confirm the report of the referee before the justice who ordered the reference, though he is then sitting at Trial Term, and the motion to confirm was noticed therefor. *Hinman v. Devlin*, 40 App. Div. 234, 57 Supp. 1037.

Under General Rules of Practice, rule 10, providing that an attorney may be changed by consent of the party or his attorney or on application of the client, on cause shown and on such terms as shall be just, a client who seeks to remove his attorneys without any charge of misconduct against them waives his right to have a jury trial on the amount of fees due them, and hence the court has power to order a reference to fix such fees before substitution. *Yuengling v. Betz*, 58 App. Div. 8, 68 Supp. 574.

Where after reversal of a judgment for the plaintiff she agrees on substituting attorneys, that the former attorney's fees be determined by the court and made a lien upon any subsequent recovery, to which the former attorney consents and both parties submit the question, the court may make an order determining the amount. A judge who presided at the trial in which such services were rendered may determine the amount without a reference, as the matters are within his personal knowledge. *Scheu v. Blum*, 124 App. Div. 678, 109 Supp. 130.

Where an attorney abandoned a case without, so far as appeared, justifiable cause he is not entitled to any further compensation, and an order of substitution should be granted unconditionally. *Cary v. Cary*, 97 App. Div. 471.

But where an attorney refuses to take any steps in an action and his client makes an application to compel him to surrender all papers in the action an order should not be granted requiring the consent to a substitution in all actions in which he is such client's attorney of record, and to deliver up all papers therein upon demand without providing for the settlement of all matters between the attorney and the client. *Philadelphia v. Postal Tel. Cable Co.*, 1 App. Div. 387, 37 Supp. 291.

If an attorney without just cause abandons his client before the proceeding for which he was retained has been conducted to its termination he forfeits all right to payment for any services which he has rendered. The contract being entire he must perform it entirely in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation. While the attorney is thus bound to entire performance, and the contract as to him is treated as an entire contract, it is a singular feature of the law that it should not be treated as an entire contract upon the other side, for it is held that a client may discharge his attorney arbitrarily without any cause at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge. *Tenney v. Berger*, 93 N. Y. 524, 529.

An attorney who refuses to proceed with the trial of an action or to permit any one else to represent his client unless the attorney is paid his claim for services thereby discharges himself from his employment, terminates the relation of attorney and client, and loses any lien given him by section 66 of the Code of Civil Procedure for services. In order to maintain such a lien the attorney must show performance upon his part or such a condition of affairs as clearly justifies his withdrawal. *Halbert v. Gibbs*, 16 App. Div. 126, 45 Supp. 113.

Where services rendered by an attorney were of no value to the client the attorney is not entitled to compensation for them and a substitution should be granted unconditionally. *Reynolds v. Kaplan*, 3 App. Div. 420, 38 Supp. 764.

Upon a motion for a substitution of attorney, a determination that the attorneys sought to be removed and their privies have, through misconduct and delay, lost their lien on a judgment in favor of their client, and all claim thereupon under contracts with him is conclusive upon them and their privies, as though the same had been determined in an action, though it may not preclude them from

recovering the value of services rendered. *Matter of Barkley*, 42 App. 597, 59 Supp. 742; *dism'd*, 161 N. Y. 647.

In *Williams v. Barkley*, 165 N. Y. 48, the court considered the relative rights of attorney and client in a case which it characterized as a protracted controversy between attorneys and client, which had been before the courts (35 App. Div. 167, 42 App. Div. 597, 161 N. Y. 647, 52 App. Div. 631), the question between attorney and client having originally arisen upon application for an order of substitution.

An attorney who is retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and he cannot abandon the service of his client without justifiable cause and only upon reasonable notice. If his compensation is stipulated and he, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination he forfeits his right to payment for services rendered. If the value of an attorney's services has not been agreed upon, but he is merely retained in a case upon the implied understanding that he shall have what his services are fairly and reasonably worth, the attorney may properly ask from time to time for advances with which to pay the expenses of the litigation and to apply upon his services, and if the client unreasonably refuses to advance money for such purposes in a reasonable amount during the progress of a long litigation sufficient cause may be furnished to justify the attorney in withdrawing from the service of his client. *Pickard v. Pickard*, 83 App. Div. 338, 31 Supp. 987.

Where on the appeal from an order denying the motion made by defendant for substitution it appeared the attorney had refused to go on with the defendant's appeal until his bill for services rendered was paid, it was held that as defendant could not compel the attorney to render his services, and on the other hand was not bound to submit to a referee's adverse decision by reason of the attorney's default, an order appealed from should be reversed. *Tuck v. Manning*, 53 Hun, 455, citing *Matter of H.*, 93 N. Y. 381, where it was held that an attorney cannot refuse to go on with an action because his client does not supply him with money, or by reason of any other difficulty, without running the risk of losing the benefit of the relation of attorney; and that in case of such refusal it is within the power of the court to permit the substitution of the new attorney and within its discretion to determine upon what terms it should be done.

An attorney who has entered into an agreement with the owner of a bond and mortgage that he is to receive, in an action brought for its foreclosure, one-half of the recovery together with the costs, in the absence of proof of misconduct or delay on his part should not be removed and another attorney be appointed in his place on the application of a purchaser of the bond and mortgage at a sale thereof by a receiver, appointed in supplementary proceedings instituted against the original owner of said bond and mortgage, but should be allowed to continue in charge of the prosecution of the action in which he is himself so largely interested. *Steenburgh v. Miller*, 11 App. Div. 286, 42 Supp. 333.

Upon granting an order for the substitution of an attorney because of the misconduct of the former attorney the Special Term should determine whether the fees of the attorney displaced are to be paid or secured, or whether the removal is absolute and unconditional, leaving the attorney to his action for fees. *Barkley v. N. Y. Central etc., R. R. Co.*, 35 App. Div. 167, 54 Supp. 970.

Upon the handing in of report of referee appointed upon an application for an order of substitution and its confirmation the court has power to compel compliance with its order by directing payment of the money to the attorney and may enforce that order by the entry of the judgment and the issuing of the execution, or may proceed to enforce the order by proceeding in the nature of contempt. *Greenfield v. Mayer*, 28 Hun, 320.

Where the attorney for plaintiff withdraws from the case and plaintiff is unable to ascertain his whereabouts the court can require the attorney for defendant to permit the substituted attorneys for plaintiff to inspect and copy the pleadings in his possession. *Butterfield v. Bennett*, 8 Supp. 910.

A surrogate has no general jurisdiction of attorneys and cannot direct a substitution except as incidental to a proceeding before him; and such an order cannot be granted on the petition of executors where the proceedings have been concluded and the attorney claims a lien on the papers in their hands not specified by the executors as having been delivered to them for the purposes of those proceedings solely. *Matter of Krakauer*, 33 Misc. 674, 68 Supp. 935.

It was held in *Dorlon v. Lewis*, 7 How. 132, that on substitution of attorneys it is only necessary to serve the adverse attorney with a written notice of the fact. In *Bogardus v. Richtmyer*, 3 Abb. 179, that in case of substitution it is sufficient to serve notice of substitution.

A note of issue cannot be filed by an attorney who has not been substituted by an order of the court, nor can an attorney who has executed a consent in blank to the substitution of another attorney subsequently file a note of issue or perform any further act in the court. *Felt v. Nichols*, 21 Misc. 404, 47 Supp. 951.

The consent of an attorney to a substitution not followed by any formal order affords no authority to the attorney sought to be substituted since rule 10 requires that a formal order be made evidencing the necessary consent of the court to the change. *Felt v. Nichols*, 21 Misc. 404, 47 Supp. 951.

Petition to Substitute Attorneys.

To the Surrogate of Albany County:

The petition of William A. Smith and Irving Coughtry, the executors of the last will and testament of Matthew W. Bender, deceased, late of the City of Albany, N. Y., respectfully shows:

1. That heretofore and on or about the 25th day of May, 1903, the last will and testament of Matthew W. Bender, deceased, late of the City of Albany, N. Y., was duly admitted to probate by the Surrogate of Albany County, N. Y., and letters testamentary thereon were issued out of this court, to William A. Smith and Irving Coughtry as executors of and under the last will and testament of Matthew W. Bender, deceased; that said executors thereupon duly qualified and entered upon the performance of their duties as such executors and still so continue to act.

2. That your petitioners as such executors have a proceeding now pending in this court for the final distribution of the estate of said deceased and for a final judicial settlement of their accounts as such executors.

3. That your petitioners as such executors retained Henry Jones and James Wilson, composing the firm of Jones & Wilson, of the City of Albany, N. Y., as attorneys to assist them in the preparation of their account and the preparation of the other papers in the above-entitled proceeding now pending in this court.

4. That the original citation for the above-entitled proceeding was duly issued out of this court returnable on the 23d day of March, 1904, and that said proceeding has been adjourned from time to time and is now adjourned until the 2d day of June, 1904, at 10 o'clock in the forenoon of that day at the Surrogate's Court in the City of Albany, N. Y.

5. That the said Henry Jones and James Wilson, compose the law firm of Jones & Wilson, and said firm are now proceeding in the court in the above-entitled proceeding against the said executors, your petitioners herein, to determine and enforce an alleged lien against your petitioners for legal services rendered by said firm of attorneys to your petitioners in the course of the administration of said estate.

6. And your petitioners further show that in the above-entitled proceeding at an adjourned hearing thereof, held in the court on the 25th day of May, 1904, the said Jones & Wilson, by James Wilson, consented to accept service of petition and notice of motion for substitution of attorneys in this proceeding on or before Saturday, May 28, 1904.

WHEREFORE, upon this petition and upon the evidence, pleadings and

proceedings in the above-entitled proceeding, your petitioners pray that an order be made substituting Dyer & Ten Eyck, Esqrs., attorneys and counselors, for your petitioners in the above-entitled proceeding now pending in this court in the place and stead of said Jones & Wilson, Esqrs.

Dated at Albany, N. Y., May 25, 1904.

(Signature of petitioners and verification.)

Consent to Substitute Attorney and Order Thereon.

SUPREME COURT — ALBANY COUNTY.

JOHN SMITH

vs.

HENRY JONES.

The undersigned hereby consent that Robert Steele, Esq., of the City and County of Albany in the State of New York, be substituted in place of William Chase, Esq., as attorney for the plaintiff in the above-entitled action and that an order to that effect be made and entered without notice.

JOHN SMITH,
Plaintiff.

WILLIAM CHASE, *Attorney for Plaintiff.*

Dated, May 24, 1910.

(Add acknowledgment by client.)

(Same title.)

On reading and filing the annexed consent of William Chase, Esq., and John Smith, Esq., and on motion of Robert Steele, Esq., of Counsel for said John Smith, it is

Ordered, that Robert Steele, Esq., of the City of Albany, be and he hereby is substituted as the attorney for the plaintiff in the above-entitled action in place of William Chase, Esq.

Enter.

RANDALL J. LEBOEUF,
Justice Supreme Court.

Subd. 2. Authority of Attorney After Judgment.

The authority of an attorney ceases on the entry of judgment, and the defendant is at liberty to employ any other attorney to take such action in relation to the judgment and cause without any order as he desires. *Davis v. Solomon*, 25 Misc. 695, citing *Egan v. Rooney*, 38 How. 121; *Cruikshank v. Goodwin*, 20 Supp. 757; *Lusk v. Hastings*, 1 Hill, 656.

In *Commerical Bank v. Foltz*, 13 App. Div. 603, the general proposition that the authority of the attorney terminates with the judgment is considered, and it is said that this statement is too broad and requires many qualifications; citing authorities to the effect that the attorney may stipulate to postpone an execution that had been issued upon a fraudulent judgment. *Read v. French*, 28 N. Y. 285. Has authority to institute supplementary proceedings. *Ward v. Roy*,

69 N. Y. 96. He can authorize the sheriff to discharge defendant held upon a body execution. *Davis v. Bowe*, 118 N. Y. 55. Has power to satisfy judgment after two years. Code, § 1260; *Woodford v. Rasbach*, 6 Civ. Pro. 321, and stating that many other instances might be referred to.

The opinion also cites *Schuler v. Maxwell*, 38 Hun, 240, and opinion of Hardin, J., in *Miller v. Shall*, 67 Barb. 446, to the proposition that the attorney may make and serve a notice of appeal from a judgment against his client; and no other attorney can issue such notice until properly substituted in the place of attorney of record.

The court sums up its conclusion by holding the true rule to be that for all purposes of collecting the judgment, or to vacate, modify, or reverse it the power of the attorney of record continues with the presumed assent of his client until some affirmative steps are taken by the client to dismiss him from the case or some of the causes intervene as specified in section 65 of the Code.

Schuler v. Maxwell, 38 Hun, 240, is cited in *Magnolia Co. v. Sterlingworth Co.*, 37 App. Div. 366, as not attempting to construe rule 3 of the Court of Appeals, and holding that that rule authorizes an appeal to the Court of Appeals from a judgment of the Appellate Division without obtaining an order of substitution by the new attorney, and that upon such retainer the authority of the former attorney ceases.

Pensa v. Pensa, 3 Misc. 417, holds that an appeal cannot be taken by an attorney who has not been regularly substituted in place of the attorney who appeared in the action; citing *Schuler v. Maxwell*, 38 Hun, 240, 101 N. Y. 657, in which the appeal was dismissed; *Miller v. Shall*, 67 Barb. 446; *Thierry v. Crawford*, 33 Hun, 366, holding that the Special Term decision in *Webb v. Milne*, 10 Civ. Pro. 27, should be disregarded.

A substitution of attorneys for plaintiff after judgment operates as a revocation of the authority of the attorney of record to satisfy the judgment upon payment, and the subsequent satisfaction executed by the original attorney is not conclusive against the substituted attorney where the judgment debtor had notice of the substitution before the payment was made. *Mitchell v. Piqua Club Assoc.*, 15 Misc. 366.

Magnolia Metal Co. v. Sterlingworth Ry. Supply Co., 6 Anno. Cas. 405, is followed by a very full note on the authority of attorneys after judgment, collating numerous authorities.

Subd. 3. Substitution on Appeal to Court of Appeals.**Rule 3. Attorneys and guardians below to continue to act.**

The attorneys and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively, in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

The effect of the provisions of rule 3 of the Court of Appeals is that a party desiring to appeal from a judgment of the Appellate Division may retain a new attorney without an order of substitution, the former attorney being deemed to be the attorney on the appeal only until another is retained. *Magnolia Metal Co. v. Sterlingworth Ry. & Supply Co.*, 37 App. Div. 366, 56 Supp. 16, aff'g 26 Misc. 63, 56 Supp. 478.

After the filing of the return on appeal to the Court of Appeals from a judgment a substitution of attorneys for a party should be made by an order of the Court of Appeals and not of the court below. *Squire v. McDonald*, 138 N. Y. 554.

It was further held in that case that the fact that an attorney who had been authorized to appear for a party, but failed to proceed in a regular manner by obtaining a substitution by order of that court, did not prevent the court from acting upon a motion made by him on behalf of his client to dismiss the appeal.

Where after appeal to the Court of Appeals the appellants' attorneys substituted another in their place at the request of their client, it was held that the motion for an order directing the former attorneys to turn over the papers in the case to the substituted attorney was not properly made in the Court of Appeals, but should have been made in the court below. *People ex rel. Hoffman v. Bd. of Education of the City of New York*, 141 N. Y. 86.

Subd. 4. Substitution on Death or Disability of Attorney. Code, § 65.**§ 65. Death or disability of attorney; proceedings thereupon.**

If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally, or in such other manner as the court directs.

Where notice to appoint an attorney is served upon the party whose attorney has died all proceedings are stayed for thirty days after notice is given to appoint another attorney. *Hickox v. Weaver*, 15 Hun, 375; *Forbes v. Muxlow*, 18 Civ. Pro. 239.

Where an attorney dies actual notice to appoint another is necessary. *Hoffman v. Rowley*, 13 Abb. 399; *Jewell v. Shouten*, 1 N. Y. 241.

The death of a client revokes the power of the attorney and services of papers on the attorney after his client's death is void. *Van Kirk v. Sedgwick*, 87 N. Y. 265; *Adams v. Nellis*, 59 How. 385.

Dissolution of a corporation terminates the power of its attorney. *Matter of Norwood*, 32 Hun, 196. Although a long suspension of proceedings in the action does not have that effect. *Bathgate v. Haskin*, 59 N. Y. 533.

Section 65 does not prohibit a referee from delivering his report before the expiration of the thirty days prescribed by that section, especially where it appears that the thirty days did not expire until after the expiration of the sixty days allowed to the referee within which to deliver his report. It was held further that the delivery of the referee's report before the expiration of the thirty days, even if it constituted a technical violation of section 65, was a mere irregularity, which was waived by the failure of the substituted attorneys to take advantage thereof before the entry of judgment, where it appeared judgment was not entered until ten days after their substitution at their request. *Agricultural Ins. Co. v. Darrow*, 70 App. Div. 413.

While the death of an attorney suspends proceedings such suspension is temporary only and ceases upon the appointment of a new attorney. *N. Y. Land Imp. Co. v. Chapman*, 14 Misc. 187, 35 Supp. 468.

The disbarment of an attorney has the same effect with reference to the rights of a client as his death, and all proceedings on the part of plaintiff are stayed in the same manner as provided for by section 65 in case of the death of an attorney. *Commercial Bank v. Foltz*, 13 App. Div. 603, 43 Supp. 985.

Section 65 has no application to the case in which the attorney dies after the entry of judgment. *Chilson v. Howe*, 17 Civ. Pro. 86, 5 Supp. 780.

Failure to observe provisions of section 65 constitutes an irregularity merely and may be obviated by subsequent proceedings. *Arthur v. Schiever*, 16 Supp. 610.

It is held in *Defendorf v. House*, 9 How. 243, that papers cannot be served upon an attorney after he becomes a resident of another State, nor can his former partner act in his name.

Section 60 of the Code was amended in 1909 and part of the section embodied in section 470 of the Judiciary Law. The latter provides that a person admitted to practice in the courts of this State, who has an office for the practice of business within the State, may

practice as an attorney although he resides in an adjoining State; while section 60 of the Code authorizes service of a paper upon such person by depositing the paper in a post-office in the city or town where his office is located properly inclosed in a postpaid wrapper directed to him at his office, and that such service is equivalent to personal service.

SUPREME COURT — ALBANY COUNTY.

SAMUEL JONES

vs.

HENRY SMITH.

To Henry Smith, defendant in the above-entitled action:

Please take notice, that you are hereby required to appoint an attorney in place of Andrew Hackett, Esq., your former attorney of record herein, who died on or about the 5th day of July, 1911, and give notice of such new appointment to the undersigned within thirty days after service of this notice, or the cause will proceed without such attorney.

HARRY H. HAMLIN,

Dated, September 15, 1911.

Attorney for Plaintiff.

ARTICLE VI.

**SUSPENSION AND DISBARMENT OF ATTORNEYS. JUDICIARY LAW,
§§ 88 (in part), 476, 477, 478.**

Subd. 1. Grounds for suspension and disbarment, 223.

§ 88. (in part) *Admission to and removal from practice by Appellate Division, 224.*

§ 476. *Suspension of attorney from practice must be on notice, 223.*

§ 477. *Attorney convicted of felony shall cease to be an attorney, 223.*

§ 478. *Suspension or removal of attorney effective in all courts, 224.*

Subd. 2. Practice, punishment, costs, appeal, 234.

**Subd. 1. Grounds for Suspension and Disbarment. §§ 88
(in part), 476, 477, 478.**

§ 476. *Suspension of attorney from practice must be on notice.*

Before an attorney or counsellor is suspended or removed as prescribed in section eighty-eight of this chapter, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the court, that he cannot be served within the state, the same may be served upon him without the state by mail or otherwise as the court may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the appellate division of the supreme court, to prosecute all cases for the removal or suspension of attorneys and counsellors. (Code Civ. Pro., § 68.)

§ 477. *Attorney convicted of felony shall cease to be attorney.*

Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law or to be competent to practice law as such. (Code Civ. Pro., § 67.)

§ 478. Suspension or removal of attorney effective in all courts.

The suspension or removal of an attorney or counsellor, by the supreme court, operates as a suspension or removal in every court of the state. (Code Civ. Pro., § 69.)

§ 88 (in part). Admission to and removal from practice by appellate division.

2. An attorney or counsellor, who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counsellor of the courts of record of this state, may be suspended from practice, or removed from office, by the appellate division of the supreme court. Any fraudulent act or misrepresentation of an applicant in connection with his application or admission shall be sufficient cause for the revocation of his license by the appellate division of the supreme court granting the same. (Code Civ. Pro., § 56.)

3. Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys.

4. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have the power to vacate or modify such order or debarment. (Code Civ. Pro., § 67.)

5. The presiding justice of the appellate division making the order of designation of a district attorney, within the department to prosecute a case for the removal or suspension of an attorney or counsellor, or the order of reference in such cases, may make an order directing the expense of such proceedings to be paid by the county treasurer of the county where the attorney or counsellor removed or suspended, or against whom charges were made as prescribed in section four hundred and seventy-six of this chapter, had his last known place of residence or principal place of business, which expenses shall be a charge upon such county. (Code Civ. Pro., § 68.)

It has been held that an attorney is an officer of the court in which he is admitted to practice, and not an officer of the State. *Matter of Burchard*, 27 Hun, 429, citing *Hamilton v. Wright*, 37 N. Y. 502.

The court may and ought to cause charges to be preferred against an attorney whenever satisfied from what has occurred in its presence, or from any satisfactory proof, that a case existed where public good and ends of justice call for it. Upon the return of the order the court will proceed properly to investigate the charges. *In re Percy*, 36 N. Y. 652. See this case for a discussion of the power of the court in removing attorneys and counselors. At common law the courts had nothing to do with the admission of attorneys or counselors to practice, citing *In re Cooper*, 22 N. Y. 67. This power of admitting attorneys to practice must therefore be conferred either by the Constitution or statute. The court then goes on to discuss the provisions of the Revised Statutes, conferring on the court the power to admit persons to practice as attorneys, and also the power of removal of such attorneys, as it existed under the Revised Stat-

utes. The court said: "From the above statute the power of removal by the court is derived. . . . It will be seen that the exercise of this power is dependent upon the general conduct of the person, and is not confined to the class of cases where particular individuals have suffered injury from such misconduct." It was insisted by the appellant in this case that the misconduct which would justify a removal must be some malpractice, or misdemeanor, practiced or committed in the exercise of the profession only, and that general bad character or misconduct would not sustain a proceeding. The court says: "I cannot concur in this position. It has been seen that the right of admission to practice is made, both by the Constitution and statute, to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally important that this character should be preserved after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision for removal is made in case such character is totally lost. . . . It is true that to warrant a removal the character must be bad in such respects as shows the party unsafe and unfit to be intrusted with the powers of the profession. There are many vices which render the character more or less bad, that have no such tendency. But a want of credibility upon oath does not come within this class. Where there can be no reliance upon the word or oath of a party, he is manifestly disqualified, and when such fact satisfactorily appears, the courts not only have the power, but it is their duty, to strike the party from the roll of attorneys. The various cases of removal, after conviction of crime, which have been made can only be sustained upon this view." It was said in the Supreme Court of the United States that the power to remove attorneys from the bar is possessed by all courts which have authority to admit attorneys to practice. *Bradley v. Fisher*, 13 Wall. 344.

In *Matter of Peterson*, 3 Paige, 512, the chancellor said in relation to proceedings for disbarment, that "solicitors, attorneys, and counselors are admitted to practice and are entitled to special privileges under the laws of the State for the purpose of enabling them to be useful to their fellow citizens in the ascertainment, prosecution, and defenses of their legal and equitable rights. And if such officers abuse the trust which has thus been reposed in them, and conduct

themselves in such a manner as to become a nuisance rather than a benefit to the community in which they reside, it is the duty of the court in which they practice, to remove them from their office; as well for the protection of the office, as to preserve the character of the honorable and useful profession. And this court, so long as I have the honor to preside in it, will not hesitate to discharge that duty fearlessly whenever a proper case for the exercise of the power is presented."

Upon proper proof of the dishonest conduct of an attorney in his professional capacity, it is the duty of the court to punish him by disbarment. *Matter of Ryan*, 143 N. Y. 528, 62 St. Rep. 822. But it is not necessary that the malpractice which will justify the disbarment of an attorney should have been committed in a suit actually pending. It is enough if it be done in his character of attorney; and thus where a solicitor forged a certificate to a paper, purporting to be an order declaring a marriage void, for the purpose of enabling the husband to induce his wife to believe that she had been legally divorced, it is held to be a proper cause for removing the solicitor. *Matter of Peterson*, 3 Paige, 510. The word "deceit" as used in section 67, Code of Civil Procedure, implies concealment or false suggestion by an attorney to injure a party, or mislead the court while he is acting in his professional capacity. *Matter of Post*, 26 St. Rep. 641, 7 Supp. 438, 4 Silvernail, 248.

An attorney convicted of an infamous crime is disqualified to practice, and the fact that the alleged order disbarring him cannot be found does not avail him. *Matter of Niles*, 5 Daly, 465. A conviction of felony against an attorney forfeits his right to practice, and if he be disbarred, a pardon does not entitle him to restoration, though the court may examine the proofs of alleged innocence in order to determine whether or not he ought to be restored. *Matter of E*—, 65 How. Pr. 171. See Code of Civil Procedure, section 67.

A suggestion that the license of an attorney to practice has been illegally granted, or obtained by such attorney, calls upon the court to inquire why such license should not be revoked, and it is not a valid objection to the proceeding that it is brought by another attorney. *Matter of O'Neil*, 27 Hun, 599, 90 N. Y. 584. See Code of Civil Procedure, section 56.

In *Matter of Baum*, 30 St. Rep. 174, 8 Supp. 771, 5 Silvernail, 462, it is said that malpractice as a lawyer means evil practice in a professional capacity, and a resorting to methods and practices un-

sanctioned and prohibited by law. A proper case for disbarment is made out when facts found by a referee prove that the attorney was guilty of unbecoming professional conduct of fraud and deceit toward his clients, offensive to the criminal law. *Matter of Titus*, 50 St. Rep. 636, 21 Supp. 724.

For a case where tampering with witnesses was held to be a fraud upon the court, and professional misconduct, see *Matter of Eldridge*, 82 N. Y. 161. As to unconscionable charges which were held to indicate a depraved professional morality, see *Matter of Powers*, 13 Wkly Dig. 476. An attorney may be disbarred for converting his client's moneys which have been given him to pay a bond and mortgage. *Matter of Burd*, 9 Wkly. Dig. 562. An attorney may be disbarred for professional misconduct in manufacturing evidence to procure a divorce. *Matter of Gale*, 75 N. Y. 526. It is held to be professional misconduct for an attorney to alter an undertaking used in an unsuccessful application, and again use it in an application to another court, without re-execution or acknowledgment. *Matter of Goldberg*, 79 Hun, 616, 61 St. Rep. 277, 29 Supp. 972. An attorney who furnishes the opposite party with copies of papers intrusted to him by his client, even though it be after the relation is at an end, will be disbarred. *Ex parte Hahn*, 11 Abb. N. C. 423. An attorney has been stricken from the rolls for altering a verification. *Matter of Loew*, 5 Hun, 426, 50 How. 373. As to whether an attorney in engaging in vexatious proceedings merely to undermine the final judgment of the court, and to defeat the law, is amenable to the disciplinary power of the court, see *People v. Jugigo*, 128 N. Y. 589, 38 St. Rep. 746. It was held in the Supreme Court of the United States that the obligations which attorneys assume on admission to the bar are not simply obedience to the Constitution and laws, but also the obligation to maintain, at all times, respect due courts of justice and judiciary officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but also include the abstaining, out of court, from insulting language and offensive conduct toward the judges personally for their judicial act; and thus a threat of personal chastisement made by an attorney to a judge out of court, for his conduct during a trial, is good ground for striking the name of the attorney from the rolls. *Bradley v. Fisher*, 13 Wall. 344.

It seems that an attorney cannot be disbarred for acts committed as a party to an action. *Matter of Post*, 26 St. Rep. 641, 7 Supp. 438. An attorney guilty of misconduct in an action or proceeding

conducted in his own behalf, is as liable to disbarment as if the disbarment were in the case of another. *Matter of Loew*, 5 Hun. 462, 50 How. 373. See also Code of Civil Procedure, section 77, to the same effect.

Evidence in a proceeding to disbar an attorney who on applying for admission to practice in the State concealed a prior conviction for crime examined, and *held* that the attorney should be disbarred.

A certificate by a judge of a foreign State, stating that the records of his court disclose nothing against the character or habits of an attorney seeking admission to practice here, is insufficient as a certificate of good moral character. Although such attorney was pardoned by the Governor of the foreign State and may have been unjustly convicted, his failure to disclose the conviction in his application for admission to practice here is, nevertheless, deception upon the court and requires his disbarment. *Matter of Pritchett*, 122 App. Div. 8, 106 Supp. 847.

An attorney who procures admission to practice at the bar of this State on papers showing that he had been duly admitted to practice law in Texas and had practiced in that State for twelve years, but who suppresses the fact that after leaving Texas and before coming to this State he had for several years practiced in Virginia under another name, and had there been disbarred for forging a decree of divorce, is guilty of fraud and deceit and will be disbarred. *Matter of Marx*, 115 App. Div. 448, 101 Supp. 680.

It is unprofessional conduct for an attorney to submit to the appellate court an affidavit reflecting upon the judicial integrity of the court from which the appeal is taken, and such conduct will not be overlooked. So, too, it is unprofessional conduct, requiring severe censure, to submit an affidavit on appeal calculated to prejudice the court against the opposing counsel by intimating that he was favored by the court below in the trial of causes. *Matter of Rockmore*, 127 App. Div. 499, 111 Supp. 879.

An attorney who, after being defeated in a cause, writes a personal letter to the trial justice complaining of his conduct and reflecting upon his integrity as a justice, is guilty of misconduct and will be disciplined by the court. It is the duty of an attorney having cause to charge a justice of the court with misconduct to prefer formal charges, on the hearing of which the justice may be heard in his own defense. The attorney is not justified in writing a personal letter to the justice or in making formal aspersions calculated to bring the court into disrepute. Though such conduct is ground

for suspension or disbarment, when the attorney asserts that such letter was written on impulse, without intention to give publicity to his alleged grievance, the court will restrict the punishment to a public reprimand. *Matter of Manheim*, 113 App. Div. 136, 99 Supp. 87.

Removal of an attorney from office is proper where he made charges of corruption against a judicial officer in the latter's court, and although given an opportunity did not apologize, show any regret, or state anything in extenuation or mitigation of his conduct. *Matter of Murray*, 33 St. Rep. 831, 11 Supp. 336.

An attorney who, in order to secure his own compensation, settles with the party against whom he has been retained to enforce claims, assigns his contracts of retainer, and notifies his clients to settle directly with such party, agreeing that to the extent of his ability he will facilitate any settlement that the latter may desire to make, is guilty of malpractice under section 67 of the Code of Civil Procedure. *Matter of Clarke*, 184 N. Y. 222, aff'g 108 App. Div. 150, 95 Supp. 388.

The refusal of an attorney to answer questions as to personal transactions upon the ground that the answers might tend to incriminate him is not a sufficient cause for his disbarment.

An attorney is not guilty of unprofessional conduct sufficient to cause his disbarment, in chartering a boat to take his client out of the State after he had been admitted to bail pending proceedings instituted for his extradition to another State, in the absence of a charge or evidence that his client intended to forfeit his bail or that he intended to reach another jurisdiction where he could not be re-arrested or compelled to return, or that his attorney was assisting him in carrying out an unlawful purpose. An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other disbarred, is guilty of unprofessional conduct justifying his disbarment. *Matter of Kaffenburgh*, 188 N. Y. 49, aff'g 115 App. Div. 346, 101 Supp. 507.

It is improper for an attorney to pay over his client's money as consideration for the withdrawal of a criminal charge against the client without distinctly informing the magistrate of the circumstances, and in so doing he is subject to censure. *Matter of Woytisek*, 120 App. Div. 373, 105 Supp. 144.

Proceedings to disbar an attorney-at-law for paying moneys to the assistant clerk of the court for his aid in procuring the release

of his clients from their obligation as bail, and the discharge without trial of persons charged with crime. Evidence examined and *held*, that the attorney should be disbarred. *Matter of Boland*, 127 App. Div. 746, 111 Supp. 932.

Misconduct of an attorney in making an affidavit to obtain an extension of time, after being ordered to discontinue by client, considered and attorney suspended. *Matter of Hansen*, 120 App. Div. 377, 105 Supp. 159; *aff'd*, 192 N. Y. 538.

Evidence taken on a proceeding to discipline an attorney-at-law for prosecuting a contest of a will against the direction of his client, who by no possibility could take as next of kin, examined, and held to be professional misconduct for which the attorney should be suspended for two years. *Matter of Randall*, 122 App. Div. 1, 106 Supp. 943; *aff'd*, 196 N. Y. 569.

An attorney employed to prosecute a suit against a street railway for a street accident employed one P to find witnesses. Two girls, fifteen and seventeen years old, testified that the attorney came to them in company with P and induced them to swear for plaintiff, though they stated to him that they knew nothing of the case. Their testimony was corroborated by P and the mother of one girl; and another witness testified that the attorney attempted to get him to swear to having seen the accident, although he told him that he had not seen it; *held* sufficient evidence of subornation of perjury to authorize the disbarment of the attorney. *Metropolitan St. Ry. Co v. Oppenheim*, 58 App. Div. 510, 69 Supp. 524.

The office of attorney and counselor is forfeited by an attorney's conviction and sentence for a crime punishable by imprisonment in the State prison, such forfeiture is like that of any other office, and is not a temporary suspension. *Matter of Niles*, 48 How. 246.

It is improper for an attorney-at-law to send communications to persons against whom he has claims to collect in such a form as to lead to the impression that an action had been commenced or that legal proceedings are pending to collect the claim. Such methods are strongly disapproved and require discipline, whether adopted by an attorney or, under his name, by a collecting agency that he authorized to use his name. *Matter of Hutson*, 127 App. Div. 492, 111 Supp. 731.

The act of an attorney in directing the sheriff to take under a writ of replevin a large quantity of goods not described in the writ, refusing to allow the defendant to take an inventory thereof, and causing the same to be immediately delivered to the plaintiffs in the

action, with full knowledge of the facts, constitutes oppression, abuse, and wrongdoing and justifies his disbarment. *Matter of Goldberg*, 49 App. Div. 357, 63 Supp. 392.

An attorney-at-law disbarred because, when retained on a contingent fee, he continued to prosecute the trial of an action and asserted his client's right to a verdict, after having discovered that the case was founded upon perjured testimony. The rule that a person cannot be convicted upon the uncorroborated testimony of an accomplice does not obtain in its strictness in a proceeding to disbar an attorney. *Matter of Hardenbrook*, 135 App. Div. 634, 121 Supp. 250; aff'd, 199 N. Y. 539.

An attorney-at-law disbarred for obtaining possession and control of property belonging to an insolvent client in fraud of creditors, for effecting the security of a single creditor in violation of the Bankruptcy Act, and for perjury and subornation of perjury in the bankruptcy proceedings. *Matter of Joseph*, 135 App. Div. 589, 120 Supp. 793.

An attorney is disbarred not only to rid the profession of an unworthy practitioner but to warn other members of the profession. An attorney of mature years who has been disbarred for gross unprofessional conduct, criminal in its nature, will not be reinstated after the lapse of two years, for the effect of such reinstatement upon the profession at large must be considered. *Matter of Clark*, 128 App. Div. 348, 112 Supp. 777.

A proceeding to disbar an attorney for converting his client's money will not be dropped merely because he has repaid the money and the client has withdrawn the charge. Such a proceeding cannot be used to enforce the collection of claims against an attorney. *Matter of Rockmore*, 130 App. Div. 586, 117 Supp. 512.

Attorney disbarred for appropriating the proceeds of two checks which he received for collection. *Matter of Assn. of Bar of City of N. Y. v. Chappell*, 131 App. Div. 69.

Attorney-at-law disbarred for converting moneys received by him to be held as trustee until a certain mortgage was delivered pursuant to the provisions of a contract, which was a part of a device to swindle the person from whom the money was received. *Matter of Flower*, 138 App. Div. 102, 122 Supp. 886.

Attorney disbarred for obtaining money upon the false representations that he had been retained in an action and for converting the sum so obtained to his personal use. *Matter of Andrews*, 137 App. Div. 353, 121 Supp. 935.

An attorney-at-law suspended for one year for obtaining earnest money on a contract for the sale of his wife's lands, knowing at the time that the lands were bound by a similar contract made with other parties. *Matter of Alexander*, 137 App. Div. 770, 122 Supp. 479.

An attorney-at-law who, contrary to the provisions of the Code of Civil Procedure and the Penal Code, agreed to pay another person procuring contracts, by which he is retained to prosecute actions at law, a percentage of the fees received by him, is guilty of a misdemeanor and should be disbarred. *Matter of Shay*, 133 App. Div. 547, 118 Supp. 546; aff'd, 196 N. Y. 530.

Attorney-at-law disciplined by suspension from practice for two years for fraud and chicanery designed to impede the course of justice, in that he drew an answer denying knowledge or information of facts which were true to his own knowledge, attempted to induce the court to accept false answers to impede a recovery of judgment where there was no defense, and drew deeds whereby his client attempted to place his property beyond the reach of creditors. *Matter of Goodman*, 135 App. Div. 594, 120 Supp. 801; aff'd, 199 N. Y. 143.

Attorney-at-law disbarred for forging an indorsement on checks received from his client, for the purpose of settling an action, and for embezzling the proceeds. *Matter of Rosenthal*, 137 App. Div. 772, 122 Supp. 471.

Attorney disbarred for receiving money to procure the pardon of one imprisoned for crime and failing to return the same as promised when unsuccessful. *Matter of O'Sullivan*, 122 App. Div. 527, 107 Supp. 462.

Attorney disbarred for appropriating client's money and contesting all efforts to compel restitution. *Matter of Cohn*, 120 App. Div. 378, 105 Supp. 84.

In considering the misappropriation of a client's money by an attorney the amount converted is not important. The standard which the court requires of its officers is not to be measured in dollars and cents. *Matter of Stern*, 120 App. Div. 375, 105 Supp. 199.

In connection with report of *Matter of Mashbir*, 7 Anno. Cas. 1, a very full and complete note will be found with reference to disbarment of attorneys, collating cases with regard to grounds for disbarment, the procedure to be taken, necessary evidence, character of punishment, and restoration of attorney to practice.

Attorney-at-law disbarred for willfully giving false testimony in behalf of a client on the trial of an action in which he had agreed to pay his client's expenses in consideration of a contingent fee.

It is immaterial whether or not the attorney was correct in his view of the legal effect of his testimony. *Matter of Klatzkie*, 142 App. Div. 352.

Attorney-at-law disciplined by suspension from practice for one year for unprofessional conduct, in unlawfully inducing another to evade service of a subpoena for which misdemeanor he was convicted and sentenced by a Federal court, for making false statements in order to deceive the court into believing that certain books of a corporation could not be produced, and for refusing to testify before a grand jury as to the affairs of a corporation of which he was a director, upon the claim that the matters related to a confidential communication with a client.

The conviction of an attorney-at-law of a misdemeanor does not of itself work a disbarment, as is the case where he is convicted of a felony. *Matter of Robinson*, 140 App. Div. 329.

Attorney-at-law suspended from practice for one year and until reinstated by the court on proof of good behavior for executing a power of attorney, in consideration of money or property received, whereby he allowed certain employees of a corporation to write letters and sign his name as attorney for the purpose of collecting debts and transacting other legal business of the corporation.

Although section 479 of the Judiciary Law only forbids an attorney-at-law from permitting another person, not his general partner or clerk, to sue out a mandate or prosecute or defend in his name, it is serious unprofessional conduct for an attorney to allow another to use his name to sign letters or communications threatening legal proceedings. *Matter of Rothschild*, 140 App. Div. 583.

An attorney who, having collected a portion of a judgment, expends the portion due to his client in paying disbursements in a suit for another client, is guilty of a breach of trust under subdivision 2 of section 88 of the Judiciary Law, and will be disciplined by suspension from practice. It is immaterial that the attorney, subsequent to the proceedings to discipline him, repaid the money to the client. *Matter of Cohn*, 141 App. Div. 511.

Attorney-at-law disbarred for filling in a paper bearing his client's signature with a general release of her cause of action, and for signing the name of another attorney to a consent to discontinuance without authority. *Matter of Greenstein*, 140 App. Div. 547.

Attorney-at-law disbarred for misappropriating moneys deposited with him in trust, to be used to cancel liens on real property which was the subject of a transaction between his client and a third party. *Matter of Prinstein*, 142 App. Div. 807.

Attorney-at-law disbarred for releasing his client's cause of action without authority, and for converting the sum received in settlement, *Matter of Lowy*, 140 App. Div. 537.

The power of the court to discipline an attorney is not limited to cases where his act was technically criminal, but he may be punished where guilty of unprofessional conduct showing a lack of due appreciation of the rules of ethics by which a lawyer's conduct should be regulated. *Matter of Chadsey*, 141 App. Div. 458, 126 Supp. 456; aff'd, 201 N. Y. 572.

Attorney-at-law disciplined by suspension from practice for writing threatening letters in behalf of a client in an endeavor to obtain incriminating correspondence. *Matter of Chadsey*, 141 App. Div. 458, 126 Supp. 456; aff'd, 201 N. Y. 572.

Where an attorney, having received moneys from a client to be applied upon insurance policies, and having instead applied the sum upon a claim against the client for legal services, obtains a judgment against his client for the balance due in a subsequent action, there is an adjudication that the sum received was payable on the debt due from the client, and there is no such misconduct as will justify the court in disciplining the attorney. *Matter of Sheehan*, 141 App. Div. 510.

Subd. 2. Practice, Punishment, Costs, Appeal.

A proceeding to disbar an attorney-at-law is a special proceeding, civil in character, the sole inquiry being as to whether he is a person qualified and fit to hold the office. *Matter of Spencer*, 137 App. Div. 330, 122 Supp. 190.

A proceeding to disbar an attorney should be instituted before the General Term of the Supreme Court, either on affidavits containing the charge to be investigated or by an order of some other court alleging the misconduct. Upon such initiation of the proceeding, the court will investigate, on its own motion, as to the sufficiency of the charges. The proceedings cannot be instituted by notice of motion. *Matter of Brewster*, 12 Hun, 109.

If charges of misconduct have been preferred against an attorney the court, upon the giving in of the report, may fix a date for the hearing and issue attachment for the purpose of securing the attorney's attendance. *Ex parte Steinert*, 24 Hun, 246.

After the preliminary examination of a verified petition presented to the Appellate Division in a matter of disbarment of an attorney, the prescribed method of procedure requires the issuance of a formal order directing the accused attorney to show cause why he should not be disbarred from practice or removed from office, citing *Anon.*, 22 Wend. 656; *Matter of Percy*, 36 App. Div. 651; *Matter of Brewster*, 12 Hun, 109; *Matter of Eldridge*, 82 N. Y. 161. If upon a return of an order to show cause the attorney makes denials the matter will be sent to a referee to take testimony in accordance with the practice approved by the Court of Appeals in the Eldridge case. *Matter of Valentine*, 92 App. Div. 612, 87 Supp. 1129.

It was said in the United States Supreme Court that, except where the acts for which an attorney is disbarred occur in open court in the presence of the judges, the power of the court so to disbar should not be exercised without notice to the offending party of the ground of the complaint, and without affording him ample opportunity of inspection and defense. *Bradley v. Fisher*, 13 Wall. 344. A solicitor cannot be stricken from the rolls on motion without filing regular charges and without a previous order to show cause. *Saxton v. Stowell*, 11 Paige, 526. Compare Code of Civil Procedure, section 68.

The proper course is for the complaining party to present the evidence of the facts relied upon, and thereupon the court will look into them, and if it comes to the conclusion that the interests of the public or honor of the profession require the proceeding they will direct a rule to show cause. *Anon.*, 22 Wend. 656.

The fact that an attorney-at-law, being a party to an action, made sham answers and false affidavits does not prevent the court from disbaring him for unprofessional conduct on the plea that he is answerable only in a civil or criminal action. A proceeding to disbar an attorney is not a criminal proceeding for the purpose of discipline or punishment, but concerns primarily the fitness of the attorney to practice. *Matter of Bauder*, 128 App. Div. 346, 112 Supp. 761.

An attorney charged with professional misconduct may be disbarred by the Appellate Division without regard to a pending indictment, and he is not entitled to a stay until the charges can be tried by a jury. *Rochester Bar Assn. v. Dorothy*, 152 N. Y. 596.

The fact that an attorney who had been indicted, convicted, sentenced, and imprisoned for forging the name of a third person to a note which he delivered to a client was subsequently pardoned

does not affect the right of the court to disbar the attorney in question for the professional misconduct. *Matter of an Attorney*, 86 N. Y. 563.

A proceeding to disbar an attorney is not a criminal proceeding, and the statutory rule of no presumption does not apply. *Matter of Spenser*, 143 App. Div. 229.

In case of the absence of the attorney the order will provide for substituted service of the papers upon him. *Matter of Murtha*, 92 App. Div. 612.

On an application to disbar an attorney he is entitled as a matter of right to an independent investigation by the State courts, and he can only be disbarred upon evidence good at common law, delivered, if he chooses, in his presence and by witnesses subject to cross-examination; the court cannot act upon testimony taken in the United States courts in a similar proceeding. *Matter of Joseph*, 125 App. Div. 544, 109 Supp. 1018.

In proceedings to disbar, a commission cannot issue to take testimony without the State except upon the defendant's consent. *Matter of an Attorney*, 83 N. Y. 164, 23 Alb. Law J. 129.

The Appellate Division has power under section 888 of the Code of Civil Procedure to issue a commission, on the application of parties moving for a disbarment, to take testimony upon written interrogatories. *Matter of Spencer*, 137 App. Div. 330, 122 Supp. 190.

In proceedings to disbar an attorney for professional misconduct, his denial of the charges and his affidavits and papers upon which the proceedings are instituted are not evidence upon the issues, but merely perform the office of pleadings, or a statement of the charges relied upon. On the trial of the issue, the common-law rules of evidence must be observed. *Matter of Eldridge*, 82 N. Y. 161. The right of an attorney in proceedings to disbar him to be tried by the court on common-law evidence is a personal right and may be waived by appearance on due notice without objection. *Anon.*, 86 N. Y. 563.

As the proceeding is a penal one, the charges must be sustained by evidence free from serious doubt. *Matter of an Attorney*, 1 Hun, 321.

To establish a charge against an attorney that he induced witnesses at a trial to swear falsely, their testimony to the fact must be corroborated. *Metropolitan St. Ry. Co. v Oppenheim*, 58 App. Div. 510, 69 Supp. 524.

In a proceeding instituted in the Appellate Division of the Supreme Court of the State of New York, to discipline an attorney and counselor-at-law of the State of New York for improper and unprofessional conduct, it is not a defense to the attorney that the improper and unprofessional conduct was committed outside the State of New York and in the United States court, and with respect to the process of that court. *Matter of Lamb*, 105 App. Div. 462, 94 Supp. 331.

It is no defense to the proceeding to remove an attorney that the court calls upon to give evidence against himself, because such attorney is not compelled to be sworn at all unless he chooses, and may introduce other evidence tending to show his innocence and submit the matter to the court without being sworn. *In re Percy*, 36 N. Y. 754.

In proceedings by an attorney to disbar another, the court has power, independent of the Code, to order the disbursements and costs of motion to be paid by the applicant when it is determined that the proceedings were instituted in bad faith. *Matter of Kelly*, 59 N. Y. 595. And upon the nonpayment of such costs, it is such misconduct as will allow imprisonment for such nonpayment. *Matter of Kelly*, 62 N. Y. 198, aff'g 3 Hun, 636, 6 T. & C. 117.

Where an attorney is young and inexperienced, the court need not disbar him for misconduct, but may suspend him from practice for a substantial period. *Matter of Goldberg*, 79 Hun, 616, 61 St. Rep. 277, 29 Supp. 972.

If an attorney has been pardoned after conviction for a felony, the court may, in proceedings to disbar him, take into consideration his conduct in committing the crime, and estimate his character and fitness to practice therefrom. *Matters of Powers*, 13 Wkly. Dig. 476.

The punishment to be inflicted upon an attorney who has been found guilty of any deceit, malpractice, crime, or misdemeanor, is largely governed by the facts of the particular case, and rests in the sound discretion of the court, the usual consideration being: Is the character of the offense such as to render the delinquent quite unfit to remain upon the roll of attorneys, or may it be so excused that justice will be done by inflicting a punishment less severe than permanent disbarment? *Matter of V.*, 10 App. Div. 491, 42 Supp. 268.

The court is not limited to the punishments prescribed in the Code of Civil Procedure, section 67, but may exercise its powers as over an officer of the Supreme Court. It seems that disbarment is

not for punishment so much as it is for the protection of the court. *Matter of Reifschneider*, 60 App. Div. 478, 69 Supp. 1069.

Attorney-at-law disbarred for making an agreement with a prospective witness to pay him a material proportion of the recovery if he would testify in a negligence action. *Matter of Schapiro*, 144 App. Div. 1.

An application for leave to resume practice by an attorney who was disbarred on the ground that he had been convicted of a crime must be determined under the law as it existed when the conviction took place; and under the statute as it existed in 1887 the attorney has the right to show that the crime of which he was found guilty was one involving no moral turpitude or any other circumstance showing that the fact of conviction alone should not be deemed sufficient cause for his removal. *Matter of Darmstadt*, 35 App. Div. 285, 55 Supp. 22.

An order suspending an attorney from practice is reviewable in the Court of Appeals. Even though the measure of punishment is a matter of discretion in the court below, the adjudication of guilt or innocence upon the facts presented is a matter for review. *Matter of Eldridge*, 82 N. Y. 161.

The power of review in disbarment cases ends in the Court of Appeals, when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony, and that there is some evidence to sustain the findings upon which the order is based. *Matter of Goodman*, 199 N. Y. 143, aff'g 135 App. Div. 594, 120 Supp. 801.

Precedents in Proceeding for Disbarment of Attorney (*Matter of Kaffenburgh*, 188 N. Y. 49).

Petition to Appellate Division.

STATE OF NEW YORK — SUPREME COURT.

APPELLATE DIVISION — FIRST DEPARTMENT.

IN THE MATTER OF ABRAHAM H. KAFFEN-
BURGH, AN ATTORNEY.

To the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department:

The petition of the Association of the Bar of the City of New York, by Howard Taylor, its attorney, respectfully represents and alleges, on information and belief:

First. The petitioner is a corporation duly created by an act of the Legislature of the State of New York, passed April 28, 1871, for the purpose, among other purposes, as stated in its charter and constitution, of maintaining the honor and dignity of the profession of the law. It is provided by section 14 of its by-laws, among other things, that: "And if specific charges of fraud or gross unprofessional conduct shall be made in writing to the Association against a member of the bar, not a member of the Association, or against a person pretending to be an attorney and counsellor-at-law practicing in this judicial district, said charges shall be investigated by the committee on grievances, and if in such case such committee shall report in writing to the executive committee that in its opinion the case is such as requires further investigation or prosecution in the courts, the executive committee may appoint one or more members of the Association to act as prosecutor whose duty it shall be to conduct the farther investigation or prosecution of such offender under the instructions and control of the committee on grievances."

Second. Heretofore and in the year 1898, Abraham Kaffenburgh, the respondent in this proceeding, was admitted to practice as an attorney and counsellor-at-law in the courts of the State of New York, and ever since has acted as such attorney and counsellor. He is now practicing as such attorney and counselor in the Borough of Manhattan, City of New York, in the First Judicial District, with an office at No. 346 Broadway, in said Borough of Manhattan.

Third. On or about the 28th day of December, 1905, Edgerton L. Winthrop, Jr., Esq., the then attorney for the committee on grievances of said association, submitted to the said committee an official copy of the stenographic minutes of the testimony of the said Kaffenburgh taken before the Hon. Watson M. Rogers and a jury in the Supreme Court, New York County, Part I. (Criminal Branch), in an action entitled "*The People of the State of New York v. Abraham H. Hummel et al.*" This testimony was duly examined by the said committee, which thereupon duly reported to said executive committee that in its opinion the case was such as to require prosecution in the courts. The said executive committee thereupon duly appointed Howard Taylor, Esq., who is a member of the association, to act as prosecutor, with authority to conduct the prosecution in the name of said association, pursuant to which authority this proceeding is taken; all of which appears more fully by the annexed affidavit of Einar Chrystie, the acting attorney of said committee on grievances, verified the 31st day of May, 1906, and hereby made a part of this petition.

Fourth. Your petitioner further alleges upon information and belief that the said Abraham H. Kaffenburgh has been guilty of malpractice, deceit or crime and gross unprofessional conduct in his office as attorney and counsellor-at-law, as follows: The petitioner respectfully refers to the fourth paragraph of the petition of the Association of the Bar of the City of New York in a proceeding, entitled "*In the Matter of Abraham H. Hummel, an Attorney.*" A copy of said petition is annexed hereto and the facts therein stated are made a part hereof as if herein fully set forth. Upon information and belief, all of the facts stated in said annexed petition were then and now are true, and your petitioner now reiterates and here alleges those facts as if herein fully set forth. Abraham H. Kaffenburgh, the individual therein referred to,

is the same person against whom this proceeding is brought. He was at all the times therein mentioned, and now is, a clerk in the office of Howe & Hummel. Upon the trial of Abraham H. Hummel for conspiracy, Kaffenburgh was called as a witness. He was asked several questions tending to elicit his connection with the matters set forth in the said annexed petition and refused to answer each and all of the questions as to his personal transactions, on the ground that his answers might tend to incriminate him. Either the witness was intentionally deceiving the court or else his connection with these matters was criminal.

Fifth. The petitioner annexes hereto the affidavit of Howard Taylor, verified the 31st day of May, 1906, and the affidavit of Einar Chrystie, verified the 31st day of May, 1906, as to the facts above alleged and referred to.

WHEREFORE, the petitioner respectfully submits the matter to this honorable court and asks that such action be taken as justice may require.

New York, May 31, 1906.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

By S. B. BROWNELL,

(Add verification.)

Recording Secretary.

Notice of Application to Appellate Division to Take Action on Charges Preferred Against Abraham H. Kaffenburgh.

(Same title.)

Sir — You are hereby advised that the petition and charges of the Association of the Bar of the City of New York, verified on the 31st day of May, 1906, charging that you have been guilty of malpractice, deceit or crime and gross unprofessional conduct as an attorney and counselor-at-law, the affidavit of Howard Taylor, verified the 31st day of May, 1906, and the affidavit of Einar Chrystie, verified the 31st day of May, 1906, a copy of which petition, charges and affidavits is hereto annexed and is herewith served upon you, will be presented to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, at the Court House of said court in Madison Square in the Borough of Manhattan, City of New York, on the 8th day of June, 1906, at one o'clock in the afternoon of that day or as soon thereafter as counsel can be heard. At the same time and place, the undersigned will also present to the court, if the court shall desire to receive the same, a copy of the testimony taken before the Hon. Watson M. Rogers, justice of the Supreme Court, and a jury in the Supreme Court, New York County, Part II. (Criminal Branch) in an action entitled "*The People of the State of New York v. Abraham H. Hummel et al.*" An application will then and there be made to the Appellate Division to take such action upon said charges as in the judgment of said court justice may require.

New York, May 31, 1906.

Yours, &c.,

HOWARD TAYLOR,

Attorney for Petitioner.

TO ABRAHAM H. KAFFENBURGH.

Order Disbarring Respondent.

(Caption in Appellate Division and title.)

Application having been made to this court by the Association of the Bar of the City of New York for an order suspending the respondent, Abraham H. Kaffenburgh, from practice and removing him from his office as an attorney and counsellor-at-law; and the same duly coming on to be heard,

Now, on reading and filing the notice of motion, dated October 10, 1906, with the affidavit of Howard Taylor, verified the same day, thereto attached, and upon reading the application herein, dated May 31, 1906, and presented to the Appellate Division on June 22, 1906, and the papers whereon such application was based, the order of the Appellate Division, dated July 12, 1906, providing that the respondent answer the charges contained in said application, and the answer of the respondent, all of which papers have been heretofore filed by the court herein; and after hearing Howard Taylor, Esq., of counsel for the Association of the Bar of the City of New York, in support of such motion, and John B. Stanchfield, Esq., of counsel for the respondent, in opposition thereto, and due deliberation having been had, it is, upon motion of Howard Taylor, attorney for the Association of the Bar of the City of New York,

Ordered, that Abraham H. Kaffenburgh be, and he hereby is, removed from his office as an attorney and counsellor-at-law in the State of New York, and that his name be stricken from the rolls of attorneys of this court.

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See DEBTOR AND CREDITOR LAW.

BOARD OF CLAIMS.

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CERTIORARI TO REVIEW ASSESSMENT.

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ARTICLE I.

OFFICE OF WRIT OF CERTIORARI.

It is said by a recent text-writer that the office of the writ of certiorari is to correct errors of a judicial character by inferior courts, and errors in the determination of special tribunals, commissioners, magistrates, and officers exercising judicial powers affecting the property or right of citizens, and who act in a summary way, or in a new way not known to the common law, and also the proceedings of municipal corporations in certain cases. *Wood on Mandamus*, 194. The writ of certiorari has under the practice, been known as a common-law certiorari, and certiorari by statute. The former is defined in Bacon's Abridgment, title Certiorari, as a writ issuing out of Chancery or the King's Bench, directed to the judges or officers of inferior courts or tribunals, commanding them to return the records of a cause or proceeding pending before them. It also, according to *Tidd's Practice*, 1138, comprehends the determination of special tribunals, magistrates, officers, and of municipal corporations in certain cases. It brought up the record either for

the purpose of examining into the legality of the proceedings or annulling or quashing an order or judgment of such inferior court, given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant sued in such inferior court surer and more certain justice before a higher tribunal. *Addison on Torts*, 1042.

The statutory writ, as its title implies, issues under a statute authorizing the granting of the remedy, and previous to the Code of Civil Procedure such statutes, to a greater or less extent, prescribed the forms and methods to be followed in laying down the rules governing its operation. The common-law writ had its scope and character clearly defined by a long line of authorities, showing the occasions upon which it would be granted, and a distinct and well-defined practice had grown up with its administration. Most of these rules were followed in practice under the statutory writ, and they have formed the basis for the present regulation found in the Code.

It is said in *People v. Van Alstyne*, 32 Barb. 131, that "sometimes the writ is expressly authorized, and its limits defined by statute, and then, of course, the nature and extent of the powers and the cases in which it is to be exercised depend mainly, if not entirely, on the provisions of the statute; sometimes there is no statutory regulation on the subject, and then the writ is denominated a common-law certiorari." The common-law writ was much more usual in practice, although there were a number of statutes prior to the Repealing Act. But no statute had defined the general use and character of the writ which is restricted to the two general classes described as common law and statutory. The practice had, aside from exceptional cases under the statutory writ, never been codified, and was the outcome of common-law procedure, and regulated by the decisions of the courts. Since there is in the present statute no attempt to define with more particularity than above stated the cases in which the writ is allowed to issue, the following quotation is made from the note of the revisers in their report of the article, in form substantially as at present, to the Legislature.

"1. A court of general jurisdiction may, in its discretion, upon the application of any party, to or in certain illy-defined cases, a person interested in a suit or proceeding before any inferior court, tribunal, board, officer, or other person, vested by law with an authority judicial in its nature (*Easton v. Calendar*, 11 Wend. 90; *Matter of Mt. Morris Square*, 2 Hill, 14; *People v. Van Alstyne*,

32 Barb. 131; *People v. Board of Health*, 33 Barb. 344; s. c., 12 Abb. Pr. 88; *People v. Supervisors of Livingston*, 43 Barb. 232); and, perhaps, also where the power is ministerial in its nature, but necessarily connected with judicial authority (*People v. Hill*, 7 Alb. Law J. 220), issue a writ of certiorari to review any final determination, judicial in its nature, made in such proceeding by such authority or, under color thereof, (*Fitch v. Kirkland Com'rs*, 22 Wend. 132; *People v. Suffolk Judges*, 24 Wend. 249); where the applicant cannot be adequately relieved in any other way. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Bd. of Health*, 33 Barb. 344, 12 Abb. Pr. 88; *People v. Overseers, etc.*, 44 Barb. 467.

"2. A court of general jurisdiction may, in its discretion, upon the application of any party to a proceeding before it, or of its own motion, issue the writ to procure from any such inferior authority information which the latter has, and which is necessary or convenient for the purposes of justice in the course of the proceedings in the higher court. 2 R. S. 599, part 3, chap. 9, tit. 3, § 45 (2 Edm. 621); *Graham v. People*, 6 Lans. 149; *Kanouse v. Martin*, 3 Sandf. 593; *People v. Cancemi*, 7 Abb. 271; *Sweet v. Overseers of Clinton*, 3 Johns. 23.

"3. The common-law remedy, as thus defined, is not taken away, in the absence of express words to that effect, either by a provision of the statute that the determination of the inferior tribunal is final (*Le Roy v. Mayor, etc.*, 20 Johns. 430; *Ex parte Mayor, etc.*, 23 Wend. 277; *People v. Freeman*, 3 Lans. 148), or by a provision in a statute giving a special writ. *Comstock v. Porter*, 5 Wend. 98; *Kellogg v. Church*, 3 Denio, 228. In the latter case the two remedies are concurrent."

This citation, with the authorities, is, perhaps, as explicit a statement as can be made of the principles regulating the issue of this writ. Previous to the Code of Civil Procedure the common-law writ had been much used to bring up matters for a review from inferior courts, which were there provided for by appeal, and the restrictions as to the use of the writ will be found enacted here.

At common law whenever a matter was pending in an appellate court and it was alleged that the record was defective, so that all the proceedings in the matter were not before it, the remedy was by writ of certiorari directed to the tribunal whose proceedings were under review, requiring it to return to the appellate court all papers and proceedings upon which it acted in making an adjudication. This was the usual and ordinary remedy, not only at common law, but

under the Revised Statutes, and in criminal as well as in civil proceedings. *Matter of Delavan Avenue*, 62 App. Div. 492 (495).

The remedy by certiorari is now seldom if ever allowed where there is any other adequate remedy. *People ex rel. Columbia Co. v. O'Brien*, 101 App. Div. 296, 91 Supp. 649.

The common-law writ of certiorari issues to review only the decisions of inferior judicial or *quasi*-judicial tribunals. It may only be issued as permitted by section 2120 of the Code of Civil Procedure, which allows it in two instances, namely, where the right thereto is conferred by statute or where the writ may be issued at common law and has not been expressly taken away by statute. *People ex rel. McNulty v. Maxwell*, 123 App. Div. 591 (594), 108 Supp. 49.

Certiorari is not a writ of right; therefore, the action of the Legislature in taking away the right to the writ is not in violation of the New York Constitution, article 6, section 6, providing for a Supreme Court with general jurisdiction in law and equity. *People ex rel. v. Board of Supervisors*, 49 Hun, 476, 2 Supp. 555.

The rule of the common law which treated the writ of certiorari as analogous to a writ of error has no application to the present statutory proceeding under which, by section 2121 of the Code of Civil Procedure, the writ of certiorari cannot issue to review a determination in a civil action or special proceeding by a court of record, or a judge of a court of record. *Beardsley v. Dolge*, 143 N. Y. 166, 62 St. Rep. 187.

It is well established that the judicial determinations of inferior tribunals and officers, acting judicially under the authority of a statute, may be reviewed under a common-law writ of certiorari, which is issued to correct errors of law affecting the property or rights of the parties and to test the validity of official action judicial or *quasi*-judicial in character. *People ex rel. Steward v. Bd. of R. R. Com'rs*, 160 N. Y. 202; *People ex rel. Loughran v. Board of Railroad Com'rs*, 158 N. Y. 421; *People ex rel. Burnham v. Jones*, 112 N. Y. 597; *People ex rel. Corwin v. Walter*, 68 N. Y. 403 (408); *People ex rel. Smith v. Hoffman*, 166 N. Y. 462 (472), rev'g 55 App. Div. 260.

The proceedings of a public improvement commission in awarding a contract for curbing and paving are neither judicial nor *quasi*-judicial and hence not subject to review by certiorari before the assessment of a tax. *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112.

A certiorari to review the acts and decisions of special jurisdictions

created by statute, and not proceeding according to the course of the common law, is not a matter of right, but will only be granted on cause shown. *People v. Supervisors of Allegany*, 15 Wend. 108.

The acts of supervisors in distinguishing between town and county poor, pursuant to section 134 of the Poor Law, and in assessing a town for the support of its poor, pursuant to sections 9 and 10 of chapter 225 of the Laws of 1896, are legislative and not judicial, and cannot be reviewed by certiorari. *People ex rel. Allen v. Supervisors*, 113 App. Div. 773.

A writ of certiorari brought to review an order of a County Court affirming a report of commissioners for the laying out of a highway on the ground of alleged irregularities in the proceedings affecting the power and jurisdiction of the County Court is properly dismissed under sections 2121, 2122 of the Code of Civil Procedure, as the decision in regard to such questions may be reviewed on appeal. *People ex rel. R. R. Co. v. County Court*, 152 N. Y. 214, aff'g 4 App. Div. 542.

The writ is only to be resorted to in case where an appeal or other appropriate and proper remedy is not available, and should not be resorted to unless necessary to obtain a review in cases where no other provision therefor is made by law. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Covert*, 1 Hill, 674; *People v. Morgan*, 65 Barb. 473; *People v. Overseers of Berne*, 44 Barb. 467; *People v. Bd. of Health*, 33 Barb. 344. The writ lies only to review acts judicial in their nature, and will not be granted to review mere ministerial acts. *People v. Mayor*, 5 Barb. 43; *People v. Hill*, 65 Barb. 170; *People v. Vanslyck*, 4 Cow. 297; *Pugsley v. Anderson*, 3 Wend. 468; *People v. Mayor*, 2 Hill, 9; *Matter of Mt. Morris Sq.*, 2 Hill, 14. And in such cases where there was a judicial discretion to be exercised by the inferior tribunal the writ should be refused. *Lawton v. Com'rs of Cambridge*, 2 Caines, 179. The present Code does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion. *People ex rel. v. Fire Com'rs*, 100 N. Y. 82.

It was said in an early case in this State that wherever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that power illegally and to the injury of an individual, the person injured may have redress by certiorari. *Wildy v. Washburn*, 16 Johns. 49. This is now, of course, subject to the qualification that no appeal is allowed by law

in such case. It is also said that the writ runs not only to courts, but to persons invested with authority to decide on the property or rights of citizens, even where, by statute, they are finally to hear and determine if right to the writ is not expressly taken away. *People v. Freeman*, 3 Lans. 148; *Leroy v. The Mayor*, 20 Johns. 429; *Bradhurst v. Turnpike Co.*, 16 Johns. 8; *Ex parte Mayor of Albany*, 23 Wend. 277. That such a provision in a statute is a bar to the writ is held in *People v. Betts*, 55 N. Y. 600, a leading case on the subject.

Where the law requires a public officer to do a specific act in a specified way, upon a conceded statement of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character. *People ex rel. Apfel v. Casey*, 66 App. Div. 211, 72 Supp. 945.

ARTICLE II.

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§ 2120. Cases where writ may issue.

The writ of certiorari regulated in this article, except the writ specified in § 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.
2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

§ 2121. Cases where it cannot issue.

A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record or a judge of a court of record.

§ 2122. The same.

Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued, in either of the following cases:

1. To review a determination, which does not finally determine the rights of the parties with respect to the matter to be reviewed.

2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.

3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

§ 2146. "Body or officer;" "determination;" what they include.

The expression, "body or officer," as used in this article, includes every court tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of certiorari; and the word, "determination," as used in this article, includes every judgment, order, decision, adjudication, or other act of such a body or officer, which is subject to be so reviewed.

Subd. 1. Granting of Writ is Discretionary.

The writ is a discretionary one, and the court has power to grant or withhold it. It cannot be demanded as a matter of right, and it lies in the sound discretion of the court whether to grant or withhold it, and it is the duty of the court to examine the matter and determine whether justice requires its allowance. This is so well settled and so strictly followed that the Court of Appeals, when a writ was quashed at General Term, refused to entertain an appeal, holding it is a matter of discretion in the court below, unless the order appealed from states that it was refused for want of power in the court to grant it. *People ex rel. Mayor v. McCarthy*, 102 N. Y. 642. It is said in *People ex rel. Smith v. Com'rs, etc.*, 3 St. Rep. 615, 103 N. Y. 370: "An order which simply quashes a common-law certiorari has often been held not appealable to this court, because the issuing of the writ rests in the discretion of the court, and consequently it can, in its discretion, recall or quash the writ without passing on the validity of the proceeding sought to be reviewed." The authorities are numerous and uniform on this point in this State, although a different rule has been held in England and also in Massachusetts. *People v. Peabody*, 26 Barb. 437; *People v. Bd. of Health*, 33 Barb. 344; *People v. City of Rochester*, 21 Barb. 656; *Matter of Eightieth St.*, 17 Abb. 324; *People v. Common Council of Utica*, 45 How. 289; *People v. Andrews*, 52 N. Y. 445; *People v. Hill*, 53 N. Y. 547. The court must be satisfied that the writ is necessary

to prevent injustice to the applicant, and that it would be beneficial to him and not detrimental to the public welfare. *People v. Mayor*, 5 Barb. 43.

An order allowing the writ will not be reversed, except in case of a palpable abuse of discretion. *People v. Cooper*, 9 Wkly. Dig. 229. It is within the discretion of the Supreme Court to grant or withhold the writ, even if the relator has no other remedy, and the decision cannot be reviewed in Court of Appeals. *People v. McCarthy*, 102 N. Y. 630.

It seems that although the allowance of certiorari is discretionary, that discretion is not arbitrary, and the writ will always issue where there is a proper subject for review, and, therefore, certiorari is considered to be an ample and sufficient remedy. *U. L. T. Co. v. Grant*, 137 N. Y. 12. But it seems that though the action of a common council, when illegal and without authority, may be reviewed by certiorari, yet such review and reversal by certiorari is not a full and adequate remedy for the illegal and improper expulsion of one from public office. *Armitage v. Fisher*, 4 Misc. 326, 56 St. Rep. 385.

Where by statute the Secretary of State, the Comptroller, and the State Reporter as a contract board had discretion in making a contract for the publication of the reports of the Court of Appeals, and made such a contract, and where, upon a writ of certiorari to review such decision, no determination was shown to have been made upon evidence, the writ of certiorari will not lie, the board having the right to the exercise of such discretion. Neither can the decision be reviewed under the authority of subdivision 3 of section 2140, as there is no proper relator whose rights have been violated. *People v. Carr*, 23 Supp. 113.

As by section 2127 the granting or refusal of the writ is discretionary with the court, an order which quashes or dismisses the writ is not appealable to the Court of Appeals, unless it appears in the order that the quashing or dismissal of the writ was made for want of jurisdiction, or upon the ground that the proceedings were found to be irregular. *People ex rel. O'Connor v. Supervisors*, 153 N. Y. 374. It is a conclusive answer on appeal that certiorari was refused as a matter of discretion unless it is claimed that the writ was denied by the court for want of power to issue it in the case presented. *People ex rel. Leo v. Hill*, 37 St. Rep. 115, 13 Supp. 188; aff'd, 126 N. Y. 502.

The writ of certiorari issues in the discretion of the Supreme Court and, inasmuch as the jurisdiction of the Court of Appeals is

limited to the review of questions of law, it is powerless to review the discretion exercised by the Supreme Court. *People ex rel. Toms v. Bd. of Supervisors*, 199 N. Y. 150, aff'g 138 App. Div. 912.

Subd. 2 Writ Issues Only, Where There is No Other Remedy.

The purpose of section 2122 of the Code of Civil Procedure is to deny the writ of certiorari, where the action of the inferior body can be adequately reviewed by a court or some other body or officer, either by a technical appeal or by a proceeding which, for the purpose of securing the desired review, is equivalent to an appeal, and the term "appeal" is there used in its broad sense, signifying a removal of a cause from a court of inferior to one of superior jurisdiction. *People ex rel. Hanford v. Thayer*, 88 Hun, 136.

It was also said before the present Code, as to the province of the writ, that it was to bring up the record or proceedings of an inferior court or tribunal to enable the reviewing court to decide whether it had acted within its jurisdiction. This has in some cases been extended to the correction of errors, but it is only allowable where there is no other remedy available, and where it is necessary to prevent injustice. *People v. Betts*, 55 N. Y. 600. Also that the office of the writ extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceeding, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by express terms of statute law, or by the common law. *People v. Bd. of Assessors*, 39 N. Y. 81.

At common law the writ of certiorari lies only to inferior courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative; therefore, a Republican county committee not being a judicial officer or body, its determination that a certain person was elected chairman cannot be reviewed by certiorari. *People ex rel. Traver v. Lauterbach*, 7 App. Div. 293, 39 Supp. 1117.

Official acts, executive, legislative, administrative, or ministerial in their nature or character, were never subject to review by certiorari. The writ could be issued only for the purpose of reviewing some judicial act. *People ex rel. Copcutt v. Bd. of Health*, 140 N. Y. 1; *People ex rel. Trustees, etc. v. Bd. of Supervisors*, 131 N. Y. 468; *People ex rel. Second Ave. R. R. Co. v. Bd. of Park Com'rs*, 97 N. Y. 37; *People ex rel. Corwin v. Walter*, 68 N. Y. 403; *People ex rel. Schuylerville & U. H. R. R. Co. v. Betts*, 55 N. Y. 600.

People ex rel. Kennedy v. Brady, 166 N. Y. 44, 47, rev'g 53 App. Div. 279.

It is well established that the judicial determinations of inferior tribunals and officers acting judicially under the authority of a statute may be reviewed under a common-law writ of certiorari, which is issued to correct errors of law affecting the property or rights of the parties, and to test the validity of official action, judicial or quasi-judicial in character. *People ex rel. Steward v. Bd. of Railroad Com'rs*, 160 N. Y. 202; *People ex rel. Loughran v. Bd. of Railroad Com'rs*, 158 N. Y. 421 (428); *People ex rel. Burnham v. Jones*, 112 N. Y. 597; *People ex rel. Corwin v. Walter*, 68 N. Y. 403 (408); *People ex rel. Smith v. Hoffman*, 166 N. Y. 462 (472), rev'g 55 App. Div. 260.

While the issuance of the common-law writ is discretionary under the Code, the statutory writ to review the decision of an excise board is imperative and not a matter of discretion. *People ex rel. Deutsch v. Dalton*, 9 Misc. 251.

Certiorari lies in any case where it would lie at common-law unless it is expressly taken away by statute. It, therefore, lies to commissioners of appraisal to review their proceedings in making an award of damages in street opening case. *Matter of Fitch*, 147 N. Y. 337.

The writ lies only to a tribunal or officer exercising judicial powers to correct errors of law materially affecting the rights of the parties. *People v. Bd. of Com'rs*, 97 N. Y. 37.

The writ of certiorari is granted to review judicial action only, and is not available to review the action of a city board in annulling a contract for a breach thereof by the contractor, and for employing laborers at less than the prevailing rate of wages, and requiring them to work more than eight hours a day, since the determination of the board is not of a judicial character. *People ex rel. Dumary v. Van Alstyne*, 53 App. Div. 1, 65 Supp. 451.

The writ lies to review only the judicial action of inferior tribunals and officers, and the fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action judicial. *People ex rel. Tracey v. Woodruff*, 54 App. Div. 1, 66 Supp. 209, 8 Anno. Cas. 124; aff'd, 166 N. Y. 597.

The Supreme Court has jurisdiction or power to review by certiorari an order of the Public Service Commission directing the receivers of a street railway company and an intersecting company to put into effect a system of transfers between their lines, as such action is judicial or quasi-judicial, even although it prescribes a rule

of conduct for the future. *People ex rel. Central Park, etc., R. R. Co. v. Willcox*, 194 N. Y. 383, aff'g 129 App. Div. 267, citing *Village of Saratoga Springs v. Saratoga Gas Co.*, 191 N. Y. 123; *Prospect Park, etc., R. R. Co. v. Coney Island, etc., R. R. Co.*, 144 N. Y. 152.

Certiorari lies to review the action of police commissioners in designating newspapers to publish a list of candidates for election. The court says: "Under such circumstances, a court having general jurisdiction to review and correct the errors of subordinate tribunals should not cramp its authority within the narrowest limits; but hold that it is broad enough to correct the evil complained of unless prevented by the force of some statute. The common-law power of this court to correct, by means of this writ, the errors of inferior tribunals exercising judicial or quasi-judicial power, is preserved by the Code of Civil Procedure, section 2120." *People ex rel. v. Martin*, 72 Hun, 369, 55 St. Rep. 453.

The writ will not issue to a purely ministerial officer to review his action. *People v. Waller*, 68 N. Y. 403. Nor does it lie to a ministerial officer to examine process under which he acts or his title to office. *People v. Supervisors of Queens*, 1 Hill, 195. The writ has been refused to review the proceedings of persons who are not officers, though they have assumed to act as such. If they are officers *de facto* their acts are valid. If they are not such, then their acts are void. *People v. Covert*, 1 Hill, 674. Title to office will not be inquired into by the writ. *Coyle v. Sherwood*, 1 Hun, 272. The writ does not lie until after final adjudication by the inferior tribunal. *Lynde v. Noble*, 20 Johns. 80; *Derlin v. Platt*, 11 Abb. 398; *Matter of Hamilton*, 58 How. 290.

Section 2120 of the Code preserves the writ of certiorari as it existed at common law, except where it is specially taken away by statute. Thus certiorari is the proper remedy to review a determination of the board of health in relation to the existence and abatement of a nuisance. *People ex rel. v. The Bd. of Health of Seneca Falls*, 35 St. Rep. 411, 12 Supp. 562.

Where a private individual illegally assumes to act as justice of the peace, his judgment requires no reversal on certiorari, being absolutely void and the act of a mere trespasser. *People ex rel. v. Moore*, 48 Hun, 619, 1 Supp. 405. Where the action of a board created by statute is not judicial, it is not reviewable on certiorari. Thus where the Laws of 1892, chapter 331, as amended, required the comptroller of the city of New York to pay debts incurred by a com-

mittee, after the same shall have been audited by the board of estimate, it was held that the action of the board as to the debt was not reviewable, not being judicial. *People ex rel. v. Gilroy*, 72 Hun, 637, 25 Supp. 878. See, also, *Lannigan ex rel. v. Mayor, etc.*, 70 N. Y. 456.

A proceeding under the General Municipal Law by resident freeholders of a village, who claim that its officers are unlawfully expending moneys raised by taxation and ask investigation, is a special proceeding, and the decision of the justice is not reviewable by a writ of certiorari. *People ex rel. Guibord v. Kellogg*, 22 App. Div. 176, 47 Supp. 1023, 81 St. Rep. 1023.

The removal by the State Superintendent of Public Instruction of a member of the board of education of a union free school district is reviewable upon certiorari, and the decision of the Special Term upon the application for the writ is not final. *Matter of Light*, 30 App. Div. 50, 51 Supp. 743, 85 St. Rep. 743, rev'g 21 Misc. 737.

Under subdivision 2 of section 2122 of the Code of Civil Procedure, which prohibits the writ where a determination can be adequately reviewed by an appeal to a court or to some other body or officer, a decision of canal appraisers denying a claim for damages will not be reviewed by certiorari, and in any event the writ will not lie while an appeal taken by the relator is pending and undecided. *People ex rel. Benedict v. Dennison*, 28 Hun, 328. The equalization by the board of supervisors of assessors' valuation among several towns cannot be reviewed by certiorari because the remedy is by an appeal to the State assessors. *People ex rel. Hill v. Supervisors*, 49 Hun, 476, 2 Supp. 557.

Acts of justices of the peace while acting in the position of inspectors of an election are merely those of ministerial officers, and if they permit unauthorized persons to keep the tally sheets and declare the result of the canvass, and to aid in the distribution of tickets, etc., the conduct of the justices is not a judicial action and cannot be reviewed by a writ of certiorari. *People ex rel. Brooks v. Bush*, 22 App. Div. 363, 48 Supp. 13, 82 St. Rep. 13. The action of a board of trustees of a village in fixing, under chapter 430, Laws of 1895, a "fair reasonable compensation" for the services of a member of the village board of health, is administrative or legislative in its nature, and consequently cannot be reviewed by a writ of certiorari. *People ex rel. Smith v. Trustees of Village of Haverstraw*, 23 App. Div. 231, 48 Supp. 740, 82 St. Rep. 740.

Certiorari will not lie except where the question to be reviewed is

clearly of a judicial character. *People ex rel. R. & J. Co. v. Wiggins*, 199 N. Y. 382, rev'g 138 App. Div. 933, 123 Supp. 1136.

When the action of a board of supervisors is legislative or ministerial in its character it cannot be reviewed on certiorari. *People v. Supervisors*, 25 Hun, 131.

The action of supervisors in passing a resolution for the improvement of town roads cannot be reviewed on certiorari. *People ex rel. Village of Jamaica v. Supervisors of Queens*, 131 N. Y. 468, 43 St. Rep. 665, rev'g 42 St. Rep. 22, 16 Supp. 705.

The writ will not lie to try title to office, and the fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action judicial. *People v. Walter*, 68 N. Y. 403.

Certiorari is only available to review a determination, judicial in character, and as the functions of a town board conducting a town election are not judicial, certiorari will not lie to review their proceedings. Where there is no allegation in the petition of any judicial action, nor anything of that character appearing in the return, it will be presumed that the acts performed by a town board are wholly administrative and, therefore, not subject to review by certiorari. *People ex rel. Van Sickel v. Austin*, 20 App. Div. 2.

As there can be no review by certiorari of an order which is not a final determination, an order made under the provisions of the County Law (L. 1892, chap. 636), sections 125 and 126, by a justice directing a person to kill a dog found to be vicious, may not be reviewed by certiorari, as such order is not a final determination of the rights of the relator. *People ex rel. Renshaw v. Gillespie*, 25 App. Div. 93, 82 St. Rep. 882, 48 Supp. 882.

As no appeal is provided by statute from a judgment of a police court, the proper remedy for the review of the determination of that court is by certiorari. *People ex rel. v. City of Rochester*, 44 Hun, 172. Certiorari issues to review the proceedings of a board of health to remove a nuisance, if the decision of such board when made is a final adjudication from which there is no appeal. *People v. Board of Health*, 58 Hun, 598.

Certiorari will not lie to review the action of an association in expelling a member, where there is a remedy by appeal. *People ex rel. v. Medical Society of Dutchess*, 84 Hun, 448, 32 Supp. 415. Thus relief from the action of a person assuming to act as justice of the peace should be had on appeal from justices' court under the Code. *People v. Moore*, 48 Hun, 619, 1 Supp. 405. Certiorari will not lie to review the commitment of a magistrate as the remedy is by

appeal, the writs of certiorari and error in special proceedings of a criminal nature being abolished by section 515, Code of Criminal Procedure. *People ex rel. v. Murray*, 62 Hun, 30; 16 Supp. 325.

The writ was held to lie to review an adjudication of contempt though the warrant of commitment had not been issued, the order for the warrant being regarded as a final adjudication. *People v. Donohue*, 22 Hun, 470.

If it concerns an erroneous decision at law, the relator's remedy, if he have any, is by certiorari and not by mandamus. *People ex rel. Myers v. Barnes*, 44 Hun, 576.

The court will not, on certiorari, vacate proceedings for a local improvement for an irregularity which does not go to the entire assessment, where there is a sufficient remedy otherwise for irregularity. *People v. City of Brooklyn*, 14 Abb. N. S. 115. Mere irregularities in submitting to the electors questions as to an improvement as authorized by statute, which are executive or ministerial acts, cannot be corrected by certiorari. *People v. Trustees of Danville*, 1 Hun, 593. On certiorari to a city to review proceedings on assessment of expenses for a bridge, the court will not, as ground for setting aside the assessment, consider the validity of a contract for building the bridge. *People v. Common Council*, 5 Lans. 142.

Commissioners of the Land Office may exercise their discretion in making a grant, but their decision as to who is the owner of adjacent uplands is a judicial one and reviewable upon certiorari where such determination involves the question of the relators title. *People ex rel. Burnham v. Jones*, 112 N. Y. 609.

The legality of a municipal board cannot be questioned on certiorari, since the writ assumes its legal existence. *People ex rel. v. Hayden*, 7 Misc. 292, 27 Supp. 893.

The writ of certiorari to review a criminal case, save a criminal contempt of court, is abolished, the remedy being by appeal.

One detained by virtue of a final judgment of a competent tribunal of criminal or civil jurisdiction is not entitled to habeas corpus to inquire into the cause of the detention. *People ex rel. Dawkins v. Frost*, 129 App. Div. 498.

Subd. 3. To State Officers.

This subdivision does not treat of the review by certiorari of the action of the Comptroller in reference to corporation taxes. This topic is treated under "Proceedings under Tax Law."

Relator, as owner of lands which had been sold for taxes, petitioned the Comptroller to cancel such sale, that any conveyance made thereunder be set aside which was denied, and the denial affirmed at General Term. In Court of Appeals, *held*, that relator was not a person aggrieved within the meaning of the Code. *People ex rel. v. Chapin*, 23 Wkly. Dig. 410, *dism'g* appeal from 38 Hun, 272.

Under the statute relating to sales of land for taxes, the Comptroller can be applied to to set aside an invalid sale, and his action reversed by certiorari or mandamus. *Clark v. Davenport*, 95 N. Y. 478. The remedy of a party believing himself aggrieved by a decision of the Comptroller denying an application for the cancellation of a sale for taxes is by certiorari and not by mandamus. *People v. Chapin*, 39 Hun, 230. See *People v. Chapin*, 23 Wkly. Dig. 410.

On certiorari by the Forest Commission to review a cancellation of a tax sale and a determination of the Comptroller refusing to set aside such cancellation as having been made without authority, the court has power to set aside such cancellation on such terms with respect to the restitution of the moneys received by the State thereon as justice requires. *People ex rel. Forest Com'rs v. Campbell*, 156 N. Y. 64, 50 N. E. 417, *rev'g* 22 App. Div. 170, 48 Supp. 183, 82 St. Rep. 183.

The owner of lands sold for taxes has no right to review by certiorari the determination of the Comptroller under section 83, chapter 427, Laws of 1855, which authorized the Comptroller, where he shall discover that a sale of land for taxes was invalid or ineffectual, to cancel such sale and refund the purchase money. Such act was intended only to relieve the purchaser from the consequences of a defective tax title. Therefore, no right of the owner was finally determined thereby, nor was he a person aggrieved by the decision within the meaning of sections 2122 and 2127 of the Code of Civil Procedure. *People ex rel. Wright v. Chapin*, 104 N. Y. 369, 8 St. Rep. 722.

As by subdivision 3 of section 2122 of the Code of Civil Procedure, the writ will not lie "where the body or officer making the determination is expressly authorized by statute to rehear the matter," it follows that a settlement of an account for taxes against a corporation by the Comptroller, under Laws of 1889, chapter 463, will not be reviewed, as his decision may be revised and readjusted by him. *People ex rel. v. Wemple*, 57 Hun, 594, 11 Supp. 246.

Certiorari will not lie to determine the right of the State Com-

missioner of Excise to take an enumeration of the inhabitants of the city of Schenectady, pursuant to the Liquor Tax Law, and to increase the cost of liquor tax certificates in said city, when, since the issue of said writ, a State census of the inhabitants of said city has been taken and the relator paid the increased sum without a demand that the certificate issue at the former cost, but with a mere protest at said increased cost. *People ex rel. Flinn v. Cullinan*, 111 App. Div. 32, 97 Supp. 194.

Semble, that a writ of certiorari may be issued to review the action of the Secretary of State in refusing to file and record a certificate of incorporation on the ground that the name of the proposed corporation is the same as that of an existing domestic corporation or so nearly resembles such names as to be calculated to deceive. *People ex rel. Columbia Co. v. O'Brien*, 101 App. Div. 296, 91 Supp. 649.

The action of the port wardens of the port of New York in adopting rules under section 2126 of the Consolidation Act cannot be reviewed by certiorari, since the making of rules, orders, and regulations was confided to their discretion and not in any sense judicial, but was an ordinary administrative or executive act. But if the board in attempting to enforce a rule which it had made, but which was in excess of the authority conferred upon it by the Legislature, fined or convicted a pilot, its action could be reviewed by certiorari. *People ex rel. Stillwell v. Gunner*, 124 App. Div. 153, 108 Supp. 726.

Subd. 4. To Supervisors and Boards of Audit.

The writ lies to review acts of boards of supervisors which are judicial in their nature; also to review and correct items illegally included in a tax levy and warrant. *People v. Supervisors of Westchester*, 57 Barb. 377. It is proper when supervisors reject, as not just and legal, a claim which the Legislature has declared to be legal, and has directed them to audit and allow. *People v. Supervisors*, 51 N. Y. 442. It was granted in *People ex rel. Burhans v. Supervisors of Ulster*, 32 Hun, 607, to review the action of a board of supervisors in fixing the amount of costs on an equalization appeal on behalf of respondents under the statute. But in passing resolutions to raise money supervisors do not act judiciously, and certiorari does not lie. *People v. Supervisors*, 43 Barb. 332.

Where a board of supervisors has considered an account on its merits and in good faith rendered a decision as to the amount which should be allowed, mandamus cannot issue to compel another audit,

but the decision may be corrected or reversed by certiorari. *People ex rel. O'Mara v. Supervisors of Cayuga County*, 40 St. Rep. 239, 16 Supp. 256.

While under subdivision 1 of section 2122 certiorari cannot issue where the determination of the inferior body is not final, it has been held that where a board of auditors reject a claim for insufficiency of proof as to its nature and extent, but allow a smaller amount, such partial rejection is a final determination on the merits which may be reviewed by certiorari. When, however, in the case above stated the claimant failed to attend and itemize his claim before the board at an adjourned day, of which he had notice, such claimant is not entitled upon certiorari to an order awarding him the total amount of the claim. *People ex rel. v. Bd. of Auditors of Hannibal*, 65 Hun, 414, 20 Supp. 165.

Where a bill against a county for services is not based on any agreement, express or implied, but the measure of compensation is the reasonable value of the services, the board of supervisors has a right to exercise its judgment and discretion, and its determination will not be reviewed on certiorari unless it appears to have been clearly erroneous and against the weight of the testimony upon which they acted. *Matter of Lanehart*, 32 App. Div. 2, 52 Supp. 671, 86 St. Rep. 671.

Certiorari lies to a board of supervisors to review the rejection of a claim declared by the Legislature to be a lawful charge against the county, when rejected on the ground that it is not just and legal. The court can reverse the proceeding, and the relator can then mandamus, if necessary. *People v. Supervisors of Madison*, 51 N. Y. 442.

An order of reference made by the Special Term upon the consent of a board of supervisors pending a hearing on a motion for a further return by them to a writ to review their action on the relator's claim, *held*, unauthorized and the proceedings thereon vacated, being in effect an attempt to substitute the Special Term for the Appellate Division and leave to the latter tribunal a review of the action of the Special Term instead of that of the board of supervisors; *held*, also, that the proceedings could not be regarded as an arbitration since the order of reference directed a further return, and provided for a review by the Supreme Court and did not effect a discontinuance of the certiorari proceedings. It seems that where the relator's claim has never been rejected by the board of supervisors an action at law does not lie against the county to collect the claim. *People ex rel.*

Martin, Bing & Co. v. County of Westchester, 53 App. Div. 339, 65 Supp. 707.

Certiorari will lie to review the audit of a claim against a county by the supervisors, allowing it in part and rejecting it in part, this being final action on their part, though a right to sue the county remains to the claimant. *People ex rel. Martin, Bing & Co. v. County of Westchester*, 57 App. Div. 135, 67 Supp. 981.

An audit of a bill will not be set aside on certiorari because of a mistake in disallowing an item which is small in amount as compared with the total amount of the claim, especially where items largely in excess of such item have been improperly allowed. *People ex rel. Caldwell v. Supervisors of Saratoga Co.*, 45 App. Div. 42, 60 Supp. 1122.

A board of town audit which has acted upon a claim may reconsider its action and reaudit the claim, although in the meantime certiorari has issued to review the prior audit, and the subsequent action is not brought up for review by the writ which will be dismissed.

The return may be considered to show the subsequent audit. *Matter of Weeks*, 106 App. Div. 45, 94 Supp. 468.

Upon reversing the action of a town board in rejecting as a whole a bill which the board had authority to reduce in amount, the court should remit the proceedings to the board with instructions to audit as required by law. *People ex rel. Village of Brockport v. Sutphin*, 166 N. Y. 163, modif'g 53 App. Div. 613, 66 Supp. 49.

Code of Civil Procedure, section 2125, provides that certiorari to review a determination must be served within four months after the determination to be reviewed becomes final; *held*, that the statute is not solely one of limitations, and certiorari would lie to review the action of a town board of audit in reducing the compensation of a health officer from the salary fixed in pursuance of law, notwithstanding the claim had passed on to the board of supervisors in regular order from the board of audit. *People ex rel. Leitner v. Sipple*, 109 App. Div. 788, 96 Supp. 897.

The town board of auditors audited claims for work on the highways performed at the request of the supervisor and without the authority of the commissioner of highways, and after the certificate of audited accounts had been delivered to the supervisor and by him to the clerk of the board of supervisors; *held*, that a writ to review the audit procured by the supervisor of highways alleging that he was a taxpayer should be dismissed, since he had no standing in either capacity to such writ, and a writ addressed to the town aud-

itors was ineffectual, since the matter had passed beyond their control. *People ex rel. Cole v. Cross*, 87 App. Div. 56, 83 Supp. 1083.

Where the county board of supervisors audited a bill presented at its annual meeting, specifying the items rejected, and giving the reasons therefor, a rejection in a subsequent year of the rejected items as "not a legal charge against the county" constituted a sufficient audit of the bill to enable the claimant to procure a review of such audit by certiorari, and a mandamus to compel the board to audit the bill was properly denied. *People ex rel. Andrus v. Bd. of Supervisors of Saratoga County*, 106 App. Div. 381, 94 Supp. 1012.

Section 19 of the County Law, prescribing the manner of designating newspapers to publish the session laws and concurrent resolutions, authorizes members of the board of supervisors representing each of the two principal political parties to designate a newspaper to publish the session laws and concurrent resolutions, and the supervisors of one party have no right to select one paper to publish session laws and another to publish the concurrent resolutions.

The purpose of the statute is to give publicity and not patronage, and such a designation is void.

Every citizen is interested in the proper publication of the session laws, and a relator who claims that his paper is eligible for designation has a sufficient interest to raise by certiorari the question of a proper selection. *People ex rel. Hall v. Ford*, 127 App. Div. 444, 112 Supp. 130.

The determination of the supervisors, representing one of the two principal political parties into which the people of a county are divided, or a majority of them, which designates a newspaper to publish the session laws and concurrent resolutions of the Legislature by virtue of section 20 of the County Law (Cons. Laws, chap. 11) is an administrative act not reviewable by certiorari. (*People ex rel. Schau v. McWilliams*, 185 N. Y. 92, followed.) *People ex rel. R. & J. Co. v. Wiggins*, 199 N. Y. 382, rev'g 138 App. Div. 933.

The writ of certiorari issues in the discretion of the Supreme Court, and, inasmuch as the jurisdiction of the Court of Appeals is limited to the review of questions of law it is powerless to review the discretion exercised by the Supreme Court.

While the Supreme Court has the power to review by certiorari, it will not, in the exercise of its discretion, review the action of a board of supervisors in levying the general tax for town and county purposes where the alleged defects are in the auditing of town and county charges and including them in the tax-roll. Such action is *quasi-judicial*.

If such an assessment is made without authority or contrary to law the relator has a legal remedy under section 16 of the County Law. *People ex rel. Toms v. Bd. of Supervisors*, 199 N. Y. 150, aff'g 138 App. Div. 912.

A board of supervisors in passing on a claim for services rendered in publishing the official list of the nominations, as required by the Election Law, may consider letters received from clerks of other counties stating the rates paid by them for similar services.

The supervisors may act upon information acquired apart from any formal hearing; it need not be presented in the form of legal evidence. The rights of a claimant are preserved if he have a hearing and permission to produce witnesses to swear them and to present his claim before the board in full.

It seems that where supervisors have allowed only a portion of a claim and a claimant has cashed the order for the amount audited, he cannot present a claim for the balance. *People ex rel. McHenry v. Bd. of Supervisors*, 140 App. Div. 759.

Subd. 5. To Municipalities, Municipal Officers, and Boards.

Certiorari is the proper remedy to review the proceedings of municipal bodies. *People v. City of Rochester*, 21 Barb. 656; *Heywood v. City of Buffalo*, 14 N. Y. 534; *People v. City of Utica*, 65 Barb. 9; *Bouton v. Brooklyn*, 2 Wend. 395. In order, however, to warrant interference with a municipal corporation by certiorari, the act must be plainly judicial. A certiorari does not lie to review a corporate resolution appropriating money for a public square. *Matter of Mt. Morris Sq.*, 2 Hill, 14.

Summary removal by the mayor of the city of Troy of the relator from the office of school commissioner "for the good of the department of public instruction," held not the subject of review by certiorari, the determination not being a judicial one. *People ex rel. Howe v. Conway*, 59 App. Div. 329, 69 Supp. 837.

Certiorari lies to review the action of a board of aldermen, being the only mode by which the action of the board can be corrected or changed in case such action is erroneous. *In re McLean*, 6 Supp. 231.

In proceedings to review the action of the board of aldermen in determining the election of one of its members, in order to review its action in disposing of marked ballots, the relator should apply for a writ requiring the board to specifically return the number of uncontested ballots given for each party, the ballots in dispute and

its action or determination on each of such disputed ballots and the grounds therefor. *People ex rel. Krulish v. Fornes*, 175 N. Y. 114, aff'g 79 App. Div. 618, 80 Supp. 385.

Upon certiorari to review the act of the common council of a city confirming a special assessment, the point that the certificate and warrants for collection of the assessment had passed into the hands of the city treasurer, and so it was too late to compel the common council to reverse its action, *held* untenable, where the charter of the city provided that a duplicate certificate be filed with the city clerk and both be regarded as originals, the duplicate being still under the control of the common council. *Stow v. Common Council of Kingston*, 25 Misc. 580, 54 Supp. 1044; aff'd, 39 App. Div. 80.

A proceeding to remove the head of a department under the charter of the city of New York is judicial and, therefore, subject to review by certiorari. *People v. Nichols*, 79 N. Y. 582.

A writ to review the proceedings of a commission to determine damages from the change of grade of a street may be issued to the commissioners before whom the proceeding was heard, although they have resigned and other commissioners have been appointed in their place, and where their return is full and complete, and shows that all the testimony, records, and proceedings are still in their custody, it is not necessary to join their successors. *People ex rel. Grout v. Stillings*, 75 App. Div. 569, 78 Supp. 333.

Where the writ is directed to a board, as that of public works in the city of New York, it should be to the members by their individual names. *People v. Com'rs*, 97 N. Y. 37.

The city of New York is not a necessary party to a proceeding to review a determination by a board appointed under a special statute. *Matter of Belmont*, 40 Misc. 133, 81 Supp. 280; aff'd, 83 App. Div. 643, 82 Supp. 1110.

The action of the mayor of the city of New York in removing the aqueduct commissioners, appointed and acting under the Laws of 1883, chapter 490, and the acts amendatory thereof, by a written notice without trial or hearing, is not reviewable by a writ of certiorari. *Matter of Ryan*, 66 Misc. 481, 122 Supp. 94.

On certiorari to review the action of the president of the board of aldermen of the city of New York in canceling the license of an auctioneer, the petitioner is not required to set out in full the evidence taken on the hearing, but need only make out a *prima facie* case showing that he was removed on an insufficient charge or upon one unsupported by the evidence.

The writ should direct that the true record be certified and returned, and upon it alone the final adjudication should be based. *Matter of Rosenthal*, 133 App. Div. 733, 118 Supp. 241.

The court has no power on a writ of certiorari to direct the commissioners of estimate and assessment, appointed under the provisions of the Greater New York charter upon changing the grade of a street, to state in their return what evidence in the case was brought to their attention; or what evidence was produced on certain facts; or upon what principles they acted; or what facts they assumed as a basis for their awards; or whether they considered benefits and, if so, what benefits and to whom, for the purpose of compelling them to make an analysis of the evidence in accordance with the relator's theory of the case, and to elaborate their own theory as to offsetting benefits.

Where the petition alleges that rulings upon questions arising upon the trial were reserved, but does not state the particular questions, or that any requests for such rulings were made, or show any prejudice to relator's rights from adverse rulings, the writ may not require the commissioners to specify all their rulings adverse to relator as to which decision was reserved on the trial. *People ex rel. Astor v. Stillings*, 68 Misc. 55, 124 Supp. 929.

Where a board of commissioners had jurisdiction and there was evidence legitimately tending to support its decision, and no rule of law was violated, its determination cannot be reviewed on a common-law certiorari. *People v. Fire Com'rs*, 82 N. Y. 358. See *Pennie v. City of Brooklyn*, 97 N. Y. 654; *Smith v. Com'rs*, 3 St. Rep. 615.

Upon a review of the act of a city board in letting a contract, pursuant to an enactment by the common council, the Appellate Division will assume that the proceedings of the common council were regular where the contrary does not appear from the return, though it does appear that the objection of such irregularity was taken before the city board where it is denied in the return. *People ex rel. Schulz v. Bd. of Contract and Apportionment of Albany*, 39 App. Div. 30, 56 Supp. 334.

Under the Laws of 1897, chapter 378 (Greater New York charter, section 648), providing that each commissioner of buildings shall have power to remove subordinate officers at pleasure, and that no provision as to suspension or other punishment shall be construed to abridge the commissioner's right to dismiss any inspector appointed by him or any predecessor, a building inspector is within the excep-

tion to section 1536, providing that all clerical and other subordinate officers "not subject to removal without cause" shall continue to hold their respective positions without prejudice; and such inspector can be removed without trial, so that a hearing granted him prior to removal is not a judicial proceeding, and a dismissal pursuant to such hearing cannot be reviewed by certiorari. *People ex rel. Scheel v. Guilfoyle*, 65 App. Div. 498, 72 Supp. 891.

Where a member of the street cleaning department of the city of New York was dismissed without having been given the notice of the proposed action required by section 537 of the charter of that city, *held*, that his remedy was not by certiorari, as the commissioner never obtained jurisdiction to make the order, and so there was nothing to review by certiorari. *People ex rel. Lahey v. Woodbury*, 112 App. Div. 79, 98 Supp. 142.

The writ of certiorari lies only to inferior courts and officers exercising judicial powers; it does not lie to review the acts of the special deputy commissioner of excise nor of the superintendent of buildings in the city of New York in revoking a liquor tax certificate for noncompliance with the local and State laws with respect to hotels, the proceedings not involving a judicial act. *Matter of Leverant*, 110 App. Div. 371, 97 Supp. 272.

In respect to the formalities to be pursued in the acquirement of lands for streets, parks, etc., in the city of New York, under section 970 of the city charter, the statute has absolutely vested discretion in the board of estimate and apportionment without prescribing the manner in which that discretion shall be exercised, and its exercise is not the subject of review by certiorari. *People ex rel. Hagerty v. McClellan*, 107 App. Div. 272, 94 Supp. 1107.

The refusal of the commissioner of public charities of the city of New York for the borough of Richmond to certify bills for the maintenance of children duly committed to the care of the Richmond County Society for the Prevention of Cruelty to Children by magistrates is an executive or an administrative act and cannot be reviewed by certiorari. *People ex rel. Richmond Co. Soc. for Prev. of Cruelty to Children v. Feeney*, 43 App. Div. 376, 60 Supp. 103.

After a municipal license to conduct an employment agency would have expired by its own time limitation, certiorari will not lie to review a revocation of the license made during its term. *People ex rel. Pechtold v. Bogart*, 122 App. Div. 872, 107 Supp. 831.

The official action of a commissioner of buildings in removing an employee by filing a statement of his reasons in writing which are

sufficient upon their face and after the removed person had an opportunity for explanation, is not a judicial act in nature or character and is not reviewable on certiorari. *People ex rel. Kennedy v. Brady*, 166 N. Y. 44.

Members of the board of health of the city of New York are administrative not judicial officers. It was not intended by section 1173 of the charter (L. 1901, chap. 466), providing that their acts shall be "regarded as in their nature judicial," to make them judicial officers, but simply to create a presumption that their acts were legal. Permits to sell milk granted by them are not property in any legal or constitutional sense, but are mere revocable licenses; their revocation is an administrative not a judicial act and may be effected without notice and an opportunity to be heard and is not reviewable by appeal or certiorari; if the revocation is arbitrary or unreasonable, the remedy of the licensee is not by a peremptory but by an alternative writ of mandamus. *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187, rev'g 117 App. Div. 856, 103 Supp. 275.

The determination of a board of health as to the existence of a nuisance is not reviewable by certiorari. *Copcutt v. Bd. of Health*, 140 N. Y. 1.

It seems that certiorari will not lie to review the action of a board of health in ordering the suppression of a nuisance without notice to the person who is alleged to maintain the nuisance, as is required by statute.

Certiorari is a proper remedy, however, to review the determination of a board of health, and it is the duty of the court to determine by such writ whether jurisdiction was obtained by the board of health and whether the authority conferred upon it has been pursued in the mode required by law in order to authorize it to make the determination. *People ex rel. N. Y. C. & H. R. R. Co. v. Bd. of Health of Seneca Falls*, 58 Hun, 595, 598, 12 Supp. 562, 35 St. Rep. 413.

The common-law writ of certiorari lies only to review acts of a judicial character, and in the absence of a statute expressly authorizing it the writ will not issue to review the act of the board of health of the city of New York in preventing the relator from carrying on the business of selling milk.

A writ of certiorari should not issue to review the action of a town board of health imposing a fine upon the relator in proceedings of which he had no notice and to collect which fine an action is threatened, since in such action he may litigate the validity of the fine. *People ex rel. Greenleaf v. Bd. of Health of Fayette*, 83 App. Div. 571, 82 Supp. 21.

Subd. 6. To Police Commissioner or Board.

It seems that the rule is well established that the courts, in reviewing by certiorari the proceedings of police or fire commissioners, are only called upon to reverse: 1. If the accused on the whole case did not have a fair trial; 2. If on the facts the decision was against the weight of evidence. And in passing upon the proceedings before police commissioners, the court will not reverse for trifling errors but will look to the whole case. *People ex rel. Muldoon v. Hayden*, 7 Misc. 278, 58 St. Rep. 537.

The court upon certiorari will review the decision of the board of police commissioners refusing to adjourn the trial of a policeman, where the latter through illness is unable to attend and where such refusal is an abuse of discretion. *People ex rel. Devery v. Martin*, 13 Misc. 22, 67 St. Rep. 850, 33 Supp. 1000.

Where police commissioners accept the voluntary resignation of a police officer and proceedings have not been instituted by them for his removal, their action cannot be inquired into on certiorari. *People ex rel. Goodwin v. Martin*, 10 Supp. 512, 32 St. Rep. 543. See s. c. on second appeal, 66 Hun, 88, 49 St. Rep. 736, also 63 St. Rep. 295.

The office of policeman, being a legislative and not a constitutional office, it was competent for the Legislature to provide in section 184 of the charter of cities of the second class (L. 1898, chap. 182) that the decision of the commissioner of public safety in a city of the second class dismissing a member of the police force upon charges preferred against him should be "final and conclusive, and not subject to review by any court." *People ex rel. Miller v. Peck*, 73 App. Div. 89, 76 Supp. 328.

The office of police surgeon of the city of Albany having been created by statute, it was competent for the Legislature to make it determinable upon any condition which it saw fit to prescribe.

The section in question does not contemplate a judicial determination by the commissioner which can be reviewed by a writ of certiorari, but only such an investigation as will satisfy the conscience of the commissioner, which cannot be reviewed in that manner.

The determination not being judicial, the section does not deprive the removed officer of the right to review secured by section 1 of article 6 of the Constitution of New York. *People ex rel. Graveline v. Ham*, 59 App. Div. 314, 69 Supp. 283.

Upon certiorari the court will indulge the same presumption in favor of a determination of a board of police commissioners in re-

moving an officer that it would in support of a verdict of a jury. *People ex rel. Doherty v. Com'rs*, 84 Hun, 66, 65 St. Rep. 175.

Though the determination of the commissioner of public safety of a city on charges against a police officer is not reviewable, his refusal to postpone the trial on sufficient cause shown is reviewable. *People ex rel. Coughlin v. Webster*, 98 App. Div. 581, 90 Supp. 723.

When no trial has been had before the police commissioner on the discharge of an officer the latter's remedy for reinstatement is by mandamus. *Matter of Elder v. Bingham*, 118 App. Div. 25, 103 Supp. 617; aff'd, 189 N. Y. 509.

Where there is competent proof of the facts necessary to be proved in order to authorize the determination of police commissioners in removing an officer, and there is no preponderance of proof against the existence of any of these facts that would justify the court in setting aside the finding of a jury as against the weight of evidence, the decision of the commissioners will not be disturbed. *People ex rel. Allen v. Welles*, 14 Misc. 226.

The court will reverse and annul a decision of police commissioners removing an officer where it has not been done after a proper trial upon charges preferred against him. So held where the policeman had been discharged upon an accusation which he had not had an opportunity to meet. *People ex rel. Lee v. Doolittle*, 44 Hun, 295. See, however, *People ex rel. McCabe v. Bd. of Fire Com'rs*, 106 N. Y. 261, 8 St. Rep. 698, holding that, where the court in which the hearing was originally had, has determined the questions and has reversed the decision of an inferior tribunal, the Court of Appeals will not review such decision. Yet it seems that even in such case where there has been an abuse of the discretion of the court below in its decision upon such hearing, the Court of Appeals will review such decision. *People ex rel. McCabe v. Bd. of Fire Com'rs*, 106 N. Y. 264, 8 St. Rep. 700.

In order for a board of police commissioners to discharge a member of the police force it must find him guilty of the charge, and a mere resolution dismissing him without finding him guilty is without effect, and he should be restored to his position. So held where a police force after hearing proofs as to charges against a policeman entertained a motion to dismiss the charges, but never decided that motion, and thereafter without finding the accused guilty of the offense passed a resolution dismissing him from the police force. *People ex rel. Reidy v. Grady*, 26 App. Div. 593.

For a case where the dismissal of a policeman from the force was

reversed as against the weight of evidence, see *People ex rel. Walker v. Roosevelt*, 26 App. Div. 183, 49 Supp. 975. In this case the testimony was founded upon the testimony of a roundsman, who saw the relator drinking something from a glass which had been brought to him while on duty, and who thereupon accused him of intoxication. The court says: "We thus have the roundsman making this serious charge upon mere suspicion, for he is forced to admit that he could not see the contents of the glass." This charge having fallen through upon the hearing, the roundsman preferred a second charge, that the policeman had used vile and insulting language to him on the way to the station-house, which testimony was refuted by three unimpeached and disinterested witnesses. Upon this latter charge conviction was had. *Held*, that it should be reversed as against the weight of evidence.

Where the judgment of police commissioners dismissing an officer from the police force in New York city was rendered upon conflicting testimony such judgment will not be reversed unless there is such a clear preponderance of proof against it as to warrant the belief that it resulted from passion, prejudice, or mistake. The court said: "The rules which govern an appellate court in reviewing the verdict of a jury apply here with equal if not greater force." *People ex rel. Shaefer v. Martin*, 28 App. Div. 74, 50 Supp. 897.

Certorari will not lie to review the refusal of a theatrical license by a police commissioner, his act being discretionary and in no sense judicial. *Armstrong v. Murphy*, 65 App. Div. 126, 72 Supp. 475.

The dismissal of a writ of certiorari brought to review the dismissal of a policeman cannot be sustained upon the ground that the petition did not meet a claim that the relator had ceased to be a member of the force, by reason of absence without leave, where such claim was first made in an amended return served nearly two years after the petition was filed. *People ex rel. Grogan v. York*, 166 N. Y. 582, rev'g 58 App. Div. 624, 69 Supp. 1142.

The allegation in the petition for certiorari to review the action of the police commissioner in removing relator as patrolman, that relator is informed and believes that certain affidavits were considered by respondent, where the source of information and grounds of relief are not disclosed, is not an allegation of fact which requires a denial. *People ex rel. Rosenberg v. Greene*, 101 App. Div. 33, 91 Supp. 803.

Under revised Greater New York charter (L. 1901, chap. 466, p. 127), section 300, prohibiting the punishment of a member of the police force till charges against him have been examined, heard and

investigated before the police commissioner or one of his deputies, and section 302 (p. 129), providing that the police commissioner shall have power on conviction by him or an officer of competent jurisdiction of a member of the force on certain charges to punish him, a deputy commissioner may convict a member, and the commissioner thereon pronounce the judgment. *People ex rel. Beardon v. Partidge*, 86 App. Div. 310, 83 Supp. 705.

A return by the police commissioner to a writ of certiorari commanding him to make a return of all proceedings had or things done "in any way or manner relating" to the dismissal of a detective in the police department, which omitted a written finding of guilt and recommendation of dismissal made by the deputy commissioner before whom the detective was tried and a certain diagram used on the trial, was insufficient. *People ex rel. Parker v. Bingham*, 57 Misc. 28, 106 Supp. 1079.

On a trial of an officer before the police commissioner for neglect of duty and conduct unbecoming an officer the rule of reasonable doubt applicable in criminal cases does not obtain. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 Supp. 417.

In *People ex rel. Buckley v. Roosevelt*, 19 App. Div. 431, it was determined that a writ of certiorari would not lie to review the action of the police commissioners of the city of New York acting under the Civil Service Law as examiners of an applicant for promotion in the police force of the city.

Upon certiorari to review the action of the board of police commissioners of the city of New York in dismissing the relator from the police force, members of the board should not be permitted to show that they considered the relator's record on the question of his guilt as well as on the question of punishment, when that fact is not disclosed by the record of their official proceedings. *People ex rel. Regan v. York*, 78 App. Div. 432, 80 Supp. 300; *aff'd* without opinion, 174 N. Y. 533.

Where the commissioner's return in a proceeding to dismiss a fireman shows only that his record was before the commissioner, and it does not affirmatively appear that it was used improperly to determine the fireman's guilt, the court reviewing the proceedings on certiorari will assume that it was used for a proper purpose. *People v. Scannell*, 56 App. 51, 67 Supp. 433.

Under the Laws of 1897, chapter 378, section 303, providing that absence without leave of any member of the police force for five consecutive days shall be deemed a resignation, and such member

shall at the expiration of such period be dismissed therefrom without notice, where the return of the police commissioners of New York to a writ of certiorari to review their action in dismissing a police officer avers that he was absent without leave for more than five consecutive days, and that such absence was held a resignation and he was dismissed from the force, such return is conclusive of his rights in the premises. *People ex rel. Hart v. York*, 73 App. Div. 445, 77 Supp. 43; aff'd, 174 N. Y. 533.

Upon an application for a further return to a writ of certiorari to review the action of respondent, the police commissioner, in dismissing relator, a police officer, from the force, so as to include the original charges served on the relator and the finding of the trial commissioner, the deputy police commissioner, will not be required to make written findings; the return containing the five charges on which relator was tried and his petition for a further return showing that the original charges consisted of the second, fourth, and fifth of those on which he was tried, and it being shown by the return what the trial commissioner orally found, while it is stated in an affidavit in opposition to the motion for a further return that such trial commissioner made no written finding. *People ex rel. Moynihan v. McAdoo*, 112 App. Div. 32, 98 Supp. 40.

A return of a police commissioner on a review of his proceedings on the trial of a police officer that he was not in the custom of swearing witnesses on such trials, and had no recollection of the trial in question, held equivalent to an admission that the witnesses were not sworn thereat, and to require a reversal of the determination of the board dismissing the officer from the police force. *People ex rel. Streubel v. York*, 45 App. Div. 503, 61 Supp. 400.

The dismissal of a member of the police force of the city of New York, who was tried before a deputy police commissioner, the final order of dismissal having been made by the police commissioner, sustained.

Semble, that a recommendation that the accused officer be dismissed, made by the deputy police commissioner who conducted such trial at the close of such trial and after a consideration of all the proof taken, is equivalent to a finding that the relator was guilty of the charges preferred against him. *People ex rel. Callan v. Partidge*, 87 App. Div. 573, 84 Supp. 487.

A technical violation of a rule in respect to an immaterial matter, which did not prejudice the rights of the public or interfere with the proper discipline of the department by a police captain who had been

a member of the police force for a period of twenty years, and who had served as police captain for two years and who during his entire service had never, so far as appeared, been charged with any violation of police rules or regulations, or with any conduct unbecoming his office, does not justify his dismissal from the force pursuant to section 302 of the revised Greater New York charter (L. 1901, chap. 466). *People ex rel. Devaney v. Greene*, 89 App. Div. 296, 85 Supp. 866.

The sufficiency of a plea of ignorance of the rules of the department as an excuse for a violation of such rules by a detective sergeant is for the commissioner to determine. *People ex rel. Daly v. Greene*, 91 App. Div. 58, 86 Supp. 322; aff'd, 178 N. Y. 617.

The nature and extent of the punishment which should be inflicted upon a member of the police force of the city of New York who has been found guilty after a trial before the police commissioner upon charges preferred against him is a matter for the police commissioner, not the court, to determine.

When the refusal of the police commissioner to grant an adjournment of the hearing of the charges because of the illness of a material witness for the accused police officer does not constitute error requiring the annulment of the commissioner's findings that the accused officer was guilty of the charges preferred against him, considered. *Police ex rel. Downes v. Greene*, 96 App. Div. 1, 88 Supp. 1060; aff'd, 181 N. Y. 550.

On certiorari to review the proceedings of the police commissioner of the city of New York dismissing the relator from the police force, held that jurisdiction *prima facie* of the deputy commissioner before whom the trial was had was established by the recitals in the record. *People ex rel. Cummings v. Greene*, 112 App. Div. 883, 97 Supp. 748.

Where the removal of a police officer was reversed on certiorari, on the ground of an erroneous refusal to admit testimony, the relator cannot object, under subdivision 3 of section 2122 of the Code of Civil Procedure, to a rehearing before the commissioners, on the ground that he is thereby tried a second time for the same offense. *People ex rel. McCormick v. McClave*, 29 St. Rep. 368.

When the police commissioner of the city of New York or either of his deputies undertakes the trial of a member of the police force of that city upon charges he constitutes a court of inferior jurisdiction; there is no presumption of jurisdiction in favor of the acts of inferior courts, and such a court must, when questioned, show that it acted

within its jurisdiction. *People ex rel. Dougan v. Greene*, 97 App. Div. 404, 89 Supp. 1067.

The fact that a member of the police force of the city of New York, while being tried before a deputy commissioner of the police department upon charges preferred against him, refuses under the advice of counsel to testify on behalf of the prosecution, does not constitute such insubordination as will justify his dismissal from the force, particularly where it appears that the accused member subsequently took the stand in his own behalf and was cross-examined at length by the prosecution.

The failure of a police sergeant of the city of New York to report an infraction of the rules of the department within less than twenty-four hours after knowledge of such infraction, but not of the identity of the persons guilty of such infraction, has been brought to his notice, will not justify the dismissal of the police sergeant. *People ex rel. Schauwecker v. Greene*, 96 App. Div. 249.

A deputy police commissioner of the city of New York may not conduct the trial of a member of the police force upon charges preferred against the latter, and thereafter report the evidence to the police commissioner without determining the guilt or innocence of the accused member, or making any recommendation in respect thereto and leave to the police commissioner the duty of passing upon the sufficiency of the evidence in the absence of the accused officer, and without notice to him or giving him an opportunity to be heard.

In such a case the act of the police commissioner in adjudging the accused member guilty and dismissing him from the force is valid. *People ex rel. Hoffman v. Partridge*, 93 App. Div. 473.

Where a deputy police commissioner of the city of New York, without making any adjudication as to the guilt or innocence of a roundsman who has been tried before him upon charges, recommends the roundsman's dismissal from the force and refers the case to the police commissioner for decision, and the police commissioner adjudges the roundsman guilty of the charges and directs his dismissal from the force, the proceedings are irregular and the roundsman is entitled to be reinstated. *People ex rel. Dougan v. Greene*, 97 App. Div. 404, 89 Supp. 1067.

The decision of the police commissioners in removing a police officer is not reviewable on certiorari where the rules governing the force authorize a dismissal from the service, and the question of the sufficiency of the officer's excuse for dereliction of duty is addressed solely to the discretion of the commissioners. Such a case is not

within the provisions of section 2140, subdivision 5. *People ex rel. Masterson v. French*, 110 N. Y. 498. But the court, in reviewing by certiorari the proceedings of police commissioners in dismissing an officer, may inquire whether there was competent proof of the charges made, and if so, whether there was such a preponderance of evidence against it as would justify setting aside the verdict of a jury. *People ex rel. Welch v. French*, 15 St. Rep. 109. In this case it was held that the needless use of his club by an officer in violation of a rule prohibiting the use of the same except in self-defense was sufficient grounds for dismissal.

Under section 2140, regulating the matters to be determined by the court upon the hearing, the question whether there was a failure to give the two days' notice of trial prescribed by the rules of the police department, where charges have been preferred against a member of the police force, is a matter essential to the jurisdiction of the police commissioners to try the relator, and the question may be determined upon certiorari. Note subdivision 2 of this section. *People ex rel. Jordan v. Martin*, 152 N. Y. 317.

Under subdivision 5 of section 2140, the General Term may set aside the adjudication of police commissioners in disciplining an officer on the merits, although there may be some evidence to sustain it; if the preponderance of truth is such that if the facts had been found by a jury on the trial of an issue in the Supreme Court, the verdict would be set aside as against the weight of evidence. But such review of the merits is ended with the decision of the General Term, and on appeal only questions of law will be considered. *People ex rel. O'Callahan v. French*, 123 N. Y. 636, 33 St. Rep. 599.

Under section 2140 the Supreme Court may inquire not only whether there was competent proof of all the facts necessary to be proved in order to authorize police commissioners in making a determination, removing an officer, but it must also look into the evidence, and if it finds that there is a preponderance against the determination of the commissioners it has the same jurisdiction to reverse the determination that it now has to set aside the verdict of the jury as against the weight of the evidence. *People ex rel. Mahoney v. McLean*, 33 St. Rep. 966, 11 Supp. 487. However, where there is no preponderance of evidence, such as would allow a verdict to be set aside, the same controlling effect must be given to the decision as to facts of the police commissioners as would be given to the decision of a jury. *People ex rel. Dolan v. McLean*, 32 St. Rep. 839, 11 Supp. 111. Under subdivisions 4 and 5 of section

2140, the power of the court is no greater than it would be over the verdict of a jury rendered on the trial of an action. Where the verdict of a jury would be conclusive as to facts the court cannot set aside the decision of commissioners as to the same facts. *People ex rel. Winchell v. McLean*, 36 St. Rep. 999.

While no employee in a bureau of any of the departments of the city government of the city of New York is entitled to a formal trial upon evidence in the proceeding to dismiss him, as are police officers and firemen, yet such employee is entitled to a hearing, and his explanation must be received and acted upon in good faith and not arbitrarily; such decision may be reviewed by certiorari. *People ex rel. Mitchell v. La Grange*, 2 App. Div. 445. See this case for facts not warranting a dismissal. The decision of police commissioners in removing a policeman will not be disturbed where the evidence does not show such preponderance of proof as would justify setting aside the verdict of a jury, or where the decision is not sustained by competent proof under section 2140. *People ex rel. O'Sullivan v. French*, 27 St. Rep. 87, 7 Supp. 489. Even where manifest injustice has been done in removing a police officer the court will not set aside the decision of the police commissioners where the excuse given by the relator for the act causing his removal was a matter solely within the judgment of the police commissioners. Bartlett, J., dissented under the authority of subdivision 1 of section 2140. *People ex rel. Hogan v. French*, 27 St. Rep. 130, 7 Supp. 460; rev'd, 119 N. Y. 502.

In certiorari to review the action of police commissioners in removing an officer matters presented by the return as to which the relator was not tried should be disregarded. *People ex rel. v. Hannan*, 56 Hun, 469, 10 Supp. 71; aff'd, 125 N. Y. 691.

Even at common law and previous to the Code the Supreme Court had power to look into the evidence brought before it in reviewing the determination of police commissioners and discharging an officer; and now by section 2140 of the Code of Civil Procedure upon such hearing it is the duty of the Supreme Court not only to inquire whether there is any competent proof tending to establish the guilt of the accused person, but it must also look into the evidence, and if it finds that there is a preponderance of evidence against the determination of the commissioners, then it has the same jurisdiction to reverse the determination that it has to set aside the verdict of a jury as against the weight of evidence; and every party who seeks such a review is entitled to a fair and judicious exercise of that juris-

diction. *McAleer v. French*, 119 N. Y. 507, 30 St. Rep. 75. Where the relator, a police officer, was discharged by the commissioners for altercation with a brother officer, in which the proof showed him to be less to blame than the other officer, who was only fined thirty days' pay, it was held that the punishment was too harsh and unequal, and that the decision should be reversed, under subdivision 5, section 2140, Code of Civil Procedure. *People ex rel. Clarson v. French*, 1 Supp. 878. Where the evidence adduced before police commissioners is direct and positive they are justified in dismissing an officer for intoxication, and the decision will not be set aside under this section. *People ex rel. Foley v. French*, 20 St. Rep. 913, 4 Supp. 172.

Though the evidence upon which police commissioners discharge a policeman for misconduct is conflicting, yet when there is sufficient evidence to show his alleged offense the order discharging him will not be reversed on certiorari. *People ex rel. Irving v. French*, 6 Supp. 394. The court has power to determine upon certiorari whether the action in discharging an officer is supported by a preponderance of proof. See *People ex rel. Strauss v. Roosevelt*, 2 App. Div. 538; *People ex rel. Brady v. French*, 11 St. Rep. 577. A writ of certiorari should be quashed without considering the merits for failure to prosecute for six years. *People ex rel. v. French*, 53 Hun, 637, 6 Supp. 431.

Under Code of Civil Procedure, section 2140, subdivision 5, limiting the court, in reviewing the evidence on certiorari, to the determination of whether there was such a preponderance of proof against the existence of the facts necessary to be proved that the verdict of a jury affirming the existence thereof would be set aside by the court as against the weight of the evidence, a police commissioner in hearing charges against an officer is vested with the function of passing upon the credibility of witnesses and the weight of their evidence, and with a wide discretion in making his determination, which will not be disturbed unless there is an absence of evidence to sustain it. *People ex rel. Brown v. Greene*, 106 App. Div. 230, 94 Supp. 477; *aff'd*, 184 N. Y. 565.

In reviewing, pursuant to a writ of certiorari, the action of the police commissioner of the city of New York in dismissing a police captain after a trial on charges, it is the duty of the Appellate Division to determine in the first instance whether there was any competent proof of all the facts necessary to be proved to justify the conviction, and if so, then to determine whether there was such a

preponderance of evidence against the determination of the commissioner as would necessitate setting aside the verdict of a jury as against the weight of evidence, had a jury found the existence of such facts in an action in the Supreme Court.

The rule of the New York police department requiring police captains to report the "location of all suspicious places and places where it is suspected that violations of the law are planned or occur," and which is silent as to what constitutes a "suspicious place," contemplates that the determination of that matter shall be left to the judgment and discretion of the police captain; such judgment and discretion must be founded upon evidence and not upon a mere whim or caprice on the part of the police captain. *People ex rel. Stephenson v. Greene*, 92 App. Div. 243, 87 Supp. 172.

The Appellate Division will not interfere with the determination of the police commissioner before whom the trial of a patrolman is had unless it is contrary to the evidence or the weight of evidence, or in some obvious sense is obnoxious to the claims of justice; strict accuracy in all technical details is not required. *People ex rel. Doherty v. Partridge*, 88 App. Div. 60, 84 Supp. 779.

In reviewing the trial of a public officer before the commissioner who dismissed him from the police force, while the Appellate Division is bound by the findings of fact on conflicting evidence, it will annul the proceedings when satisfied that the findings are clearly against the weight of evidence. *People ex rel. McCormick v. Partridge*, 95 App. Div. 323, 88 Supp. 657.

When the dismissal of a patrolman by the police commissioner of New York city has been reversed on certiorari for want of evidence justifying the dismissal a motion to vacate the order of reinstatement, to cancel the return to the writ on the ground that it was false and untrue, and to file an amended and corrected return and for a reargument, will be denied, where it appeared that the testimony contained in the return was substantially that taken before the deputy commissioner, and it did not appear that the police commissioner had ever read any evidence of any sort before dismissing the relator. *People ex rel. Ringelman v. Bingham*, 133 App. Div. 241, 117 Supp. 363.

The relator, having been found to have been illegally dismissed from the police force, *held*, nevertheless, that a condition of reversing the judgment of dismissal should be his waiving a claim for salary for the two years during which he had failed to apply for a writ of certiorari. *People ex rel. Snyder v. Partridge*, 83 App. Div. 262, 82 Supp. 109.

Upon the review of a finding by police commissioners dismissing an officer from service a distinction is to be taken between cases in which the act charged is admitted by the relator, and the question is whether he has presented a sufficient excuse, and cases in which the act is denied; and the discretion resting with the commissioners in the former class of cases does not extend to the latter, the finding on which may be set aside as against the weight of evidence, where a verdict of a jury on the same testimony would be. *People ex rel. Sampson v. York*, 35 App. Div. 430, 54 Supp. 835.

Certiorari does not lie to review a determination of the police commissioner of the city of New York revoking the license of engineers employed in that department after a trial of charges against them pursuant to section 343 of the charter, as it was an administrative, not judicial, act.

Moreover, where the statute makes such a revocation effective for six months only and that time has expired, so that the relator can apply for a new license, the validity of the former revocation is a purely academic question. *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 122 Supp. 708; *dism'd*, 200 N. Y. 511.

Certiorari to review the action of the police commissioner of the city of New York in dismissing a police officer for conduct unbecoming an officer, and for intoxication. Evidence examined and held insufficient to establish the charges, and that the relator should be reinstated. *People ex rel. Byrne v. Baker*, 140 App. Div. 137.

The determination of the police commissioner of the city of New York to refuse a license to a theater is not a judicial determination and cannot be reviewed by certiorari. *People ex rel. Bojfiglio v. Baker*, 67 Misc. 539, 124 Supp. 751.

The action of a police commissioner in removing a police officer can only be reviewed by certiorari on the grounds enumerated in section 2140 of the Code of Civil Procedure.

On the trial of charges against a police officer before the commissioner he is entitled to the benefit of counsel. But where an officer has been represented by counsel he is not entitled to reinstatement merely because his counsel, by reason of illness, failed to appear on the day to which the trial was adjourned, if knowing the facts the officer made no application for an adjournment until the time of the hearing at which witnesses from out of town were present to testify, and neither offered to testify that he had a meritorious defense nor presented an affidavit of merits. Under the circumstances the rights of the officer have not been "violated to his prejudice"

within the meaning of subdivision 3 of section 2140 of the Code of Civil Procedure.

The police commissioner has authority to pass upon the question of the sufficiency of the ground presented for an adjournment. The determination is a matter of discretion governed by no hard and fast rule. *People ex rel. O'Neill v. Bingham*, 132 App. Div. 667, 117 Supp. 429.

The determination of the police commissioner of the city of New York in refusing to grant a theatrical license under section 1473 of the Greater New York charter (L. 1897, chap. 378) was not a judicial act, but is discretionary with the commissioner as an executive, administrative, or ministerial act, and hence not reviewable by certiorari. *Matter of Armstrong v. Murphy*, No. 2, 65 App. Div. 126, 72 Supp. 475.

The fact that the petition for a writ of certiorari to review the action of the commissioner in dismissing the accused patrolman from the force after having been adjudged, upon the evidence given at the trial, that he was guilty of the charges preferred against him, sets forth the conversation which took place prior to the trial, in which the police commissioner expressed to the counsel for the accused patrolman his belief in the latter's guilt does not, in the absence of a specific requirement to that effect in the writ, require the police commissioner in the return to the writ to set forth such conversation.

If, in such case, the relator deems it important that the return shall show whether the police commissioner made the statement attributed to him in the petition, he should apply for an order directing the police commissioner to make a further return. *People ex rel. Campbell v. Partridge*, 99 App. Div. 419, 91 Supp. 258; aff'd, 180 N. Y. 542.

Though on certiorari to review the dismissal of an officer from the police force, the court is required to review the proceeding and determine whether it was conducted according to law and whether the finding was supported by the evidence, it has nothing to do with the punishment nor with the judgment of the commissioner as to what acts constitute conduct unbecoming an officer, further than to say that the conduct proven fairly required the exercise of judgment. *People ex rel. Berlin v. Bingham*, 124 App. Div. 553, 108 Supp. 933.

A fair trial of a member of the New York police force requires that the accused shall be confronted by the witnesses against him and given an opportunity to hear their statements under oath, and to cross-examine them to a reasonable extent. Hearsay evidence

cannot be received; evidence cannot be taken in the absence of the accused, and the trier of the fact can find facts only on the evidence and not on his own knowledge, except such facts as may be the subject of judicial notice; hence it is error for a deputy commissioner to act upon private information received in the absence of relator and for that reason reject the evidence of an important witness. *Matter of Greenebaum v. Bingham*, 201 N. Y. 343, rev'g 137 App. Div. 925.

Subd. 7. To Fire Department.

Removal of the engineer of the fire department of Long Island City by the fire commissioners thereof, *held* not reviewable by certiorari, there being no conditions or form prescribed for such removal, and no statutory authority for the writ. *People ex rel. Paynter v. Gleason*, 63 App. Div. 435, 71 Supp. 700.

Removal of a member of the city fire department, under a provision in the charter which provides for suspension by a commissioner until the board "shall convene and take action in the matter; provided, however, that such member shall not remain so suspended for a longer period than thirty days without an opportunity of being heard in his defense; and upon hearing the proofs in the case a majority of such commissioners may discharge or restore," is subject to review by certiorari, the proceeding being a judicial one in its nature. *People ex rel. Ellett v. Flood*, 64 App. Div. 209, 71 Supp. 1067.

Upon certiorari to review the dismissal of the relator from his position as member of the uniformed force of the fire department of the city, only errors specified in the petition will be considered, and if the record of the relator was before the commissioner it will be presumed to have been used only for a proper purpose, in the absence of allegation and proof to the contrary, and not for the purpose of determining him guilty of the present charge. *People ex rel. McCollum v. Scannell*, 56 App. Div. 51, 67 Supp. 433.

The office of deputy tax commissioner of the city of New York is an office excepted, by the language thereof, from the provisions of the Civil Service Law prohibiting the removal of an honorably discharged soldier or volunteer fireman from any position by appointment or employment, in the State or any of the cities thereof, except for incompetency or misconduct after a hearing upon stated charges; and, therefore, an honorably discharged volunteer fireman who has been removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation under

the provisions of section 1543 of the charter, is not entitled to a hearing upon stated charges, and a writ of certiorari to review his removal will not lie. *People ex rel. Ryan v. Wells*, 176 N. Y. 462, rev'g 86 App. Div. 270, 83 Supp. 789.

Subd. 8. Review by Certiorari Under Election Law.

Election Law, chapter 17 of the Consolidated Laws, provides as follows:

§ 70. Jurisdiction of, and review by, the courts.

Any action or neglect of the officers or members of a political convention or committee, or of any inspector of primary election, or of any public officer, or board, with regard to the right of any person to participate in a primary election, convention or committee, or to enroll with any party, or with regard to any right given to, or duty prescribed for, any voter, political committee, political convention, officer or board, by this article, shall be reviewable by the appropriate remedy of mandamus or certiorari, as the case may require. . . . For any of the purposes of this section, service of a writ of mandamus, certiorari, order or other process of said court or justice or judge thereof upon the chairman or secretary of such convention, committee or board, shall be sufficient.

The subject of "Certiorari to Review Proceedings Relative to Elections" is treated under Election Law.

Subd. 9. In Highway Matters.

Certiorari will lie to review the error of a county judge confirming the report of commissioners appointed to lay out a highway, because in proceedings of that character the county judge acts not as a judge of any court, but as an officer specially designated by statute under his title of office. His order, therefore, is not appealable. *People ex rel. Tittsworth v. Nash*, 38 St. Rep. 730, 15 Supp. 29.

The decision of a County Court confirming the report of commissioners appointed to lay out a highway is final and cannot be reviewed by certiorari; and even if such decision were not final the writ would not lie because the relators have their remedy by appeal. *Matter of Taylor and Allen*, 8 App. Div. 395.

Certiorari will lie to review the action of commissioners in laying out a highway under the statute, when such action is claimed to be illegal, upon the ground that the act is unconstitutional. *People ex rel. v. Mosier*, 56 Hun, 64, 8 Supp. 621. See, also, *People ex rel. v. Stedman*, 57 Hun, 280, 10 Supp. 787. See, also, for decisions under the Highway Law, *People ex rel. v. Nash*, 60 Hun, 582, 15 Supp. 29; *People ex rel. v. Moore*, 60 Hun, 586, 15 Supp. 504; aff'd, 129 N. Y. 639.

Where objection was made to the writ of certiorari on the grounds that the relator had the right to appeal from a decision of the com-

missioners of highways laying out a road, it was held that the writ was properly granted, as the proceedings leading up to the order of the commissioners and the determination evidenced thereby could not "be adequately reviewed by an appeal to a court or to some other body or officers," there being in this case substantial irregularities in the preliminary proceedings laying out such highway. *People ex rel. Scrafford v. Stedman*, 57 Hun, 280, 32 St. Rep. 649.

Where a County Court has affirmed the report of commissioners under the Highway Law (chap. 568, L. 1890), which decision laid out a highway, the same cannot be reviewed by certiorari, because the act provides that the decision of the County Court shall be final, excepting that a new hearing may be ordered. *People ex rel. D. L. & R. R. Co. v. County Court*, 4 App. Div. 543.

Certiorari will not lie to review the order of a County Court appointing commissioners to certify to the necessity of altering a highway pursuant to section 84 of the Highway Law. The word "appeal" as used in section 2122 of the Code of Civil Procedure is used in its broad sense, signifying a removal of a cause from a court of inferior to one of superior jurisdiction. *People ex rel. Hanford v. Thayer*, 88 Hun, 139, 68 St. Rep. 280.

Under sections 2121 and 2122 of the Code of Civil Procedure, a writ of certiorari which is brought to review the order of a County Court, affirming a report of the commissioners for laying out a highway, on the ground of alleged irregularities in the proceedings which affect the power and jurisdiction of the County Court, will be dismissed because the decision of the County Court may be reviewed upon appeal. *People ex rel. R. R. Co. v. County Court*, 152 N. Y. 216; rep'd below, 4 App. Div. 542.

Where a County Court has under the Laws of 1896, chapter 568, appointed commissioners to certify as to the necessity of altering a highway and assess the damages, the remedy to review their proceedings is upon motion to confirm or vacate their report before the County Court, and not by certiorari, as the use of the writ is restricted by the Code of Civil Procedure, section 2122. *People ex rel. Hanford v. Thayer*, 88 Hun, 136, 34 Supp. 592, dist'g *People ex rel. Tittsworth v. Nash*, 15 Supp. 29, 38 St. Rep. 730.

When the relator attempted to review the proceedings of highway commissioners in laying out a road, by the writ, on the ground that he was an innkeeper whose business would be injured by the diversion of travel from the road on which his hotel was located, to the highway laid out, and it appeared that he was in no way a party to the

proceeding, and did not own property over which the new highway passed, the writ was not sustained. *People v. Schell*, 5 Lans. 352.

The denials and allegations contained in the return to a writ of certiorari must be taken as true, so far as they join issue upon the material allegations of the petition.

The court will not review in proceeding, for the opening of a highway, facts stated in the return, where such facts are founded on personal inspection and individual knowledge of the particular locality. *People ex rel. Burnett v. Van Brunt*, 99 App. Div. 564, 90 Supp. 845.

Subd. 10. To Civil Service Board.

It is held in *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, rev'g 100 App. Div. 176, that the determination of a municipal civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion, is more of a legislative or executive character than judicial or *quasi* judicial, and, therefore, is not reviewable by certiorari.

The court discusses fully the general principle that mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty, when the manner of performance is in his discretion; and upon full consideration of the question retracts the rule laid down in *People ex rel. Sims v. Collier*, 175 N. Y. 196, where it was held that the remedy in the case then at bar was not by mandamus but by certiorari.

Certiorari will not lie to review the action of municipal civil service commissioners in classifying a position under a particular schedule pursuant to Laws of 1899, chapter 370, section 10, their duties in this regard being administrative rather than judicial. *People ex rel. Mack v. Burt*, 65 App. Div. 157, 72 Supp. 567; aff'd without opinion, 170 N. Y. 620. See 185 N. Y. 92, *supra*.

It seems under section 21 of the Civil Service Law mandamus is the writ pointed out for noncompliance with its provisions, and certiorari is the remedy where an appointee is entitled to a trial before removal. *People ex rel. Donnelly v. Harvey*, 127 App. Div. 211, 111 Supp. 167.

In the absence of charges of bad faith or illegal action, the Appellate Division cannot review, either by certiorari or by mandamus, the determination of a municipal civil service commission in rating candidates in competitive examinations. *Baldwin v. Rice*, 100 App. Div. 241, 89 Supp. 738; aff'd, 183 N. Y. 55.

Under section 21, Civil Service Law, preferences are allowed honorably discharged soldiers, sailors, and marines in appointment and promotion without regard to their standing or any list from which said appointment or promotion may be made in certain positions; and said honorably discharged soldiers, sailors, or marines have a right of action in any court of competent jurisdiction for damages for refusal to appoint him to said position, and also a remedy by mandamus for righting the wrong.

Section 22 provides that no honorably discharged soldier, sailor, or marine shall be removed from position held by him, except for incompetency or misconduct, without the right to a writ of review by certiorari in case of said removal. It is also provided "that every person whose rights may be in any way prejudiced contrary to the provisions of this section shall be entitled to a writ of mandamus to remedy the wrong."

It seems that a veteran in the classified civil service should not be removed for a single act of negligence, unless in the light of the attendant facts and circumstances it constitutes such a serious failure of duty as to show incompetency.

The Legislature, in recognition of the services to the State and to the nation performed by veterans, may exempt them from removal from office except for incompetency or misconduct, shown after a hearing upon due notice upon stated charges, and may give a right of review by writ of certiorari.

Charges which will justify the removal of a veteran in the classified civil service must be substantial, not trivial or technical or showing a mere mistake of judgment without bad faith or evil purpose.

The remedy by certiorari to remove such veteran extends not only to questions of jurisdiction, but to the sufficiency of the charges; the evidence and the weight or preponderance thereof, and to the question as to whether any rule of law affecting his rights has been violated to his prejudice.

The court on certiorari to review the removal of such veteran may reinstate him and remit the matter to the board or officers whose determination is reviewed for further consideration, or for a hearing which may be on the same charges, or on those and additional charges, where the determination removing him is based on the admission or consideration of incompetent evidence or other action prejudicial to his rights to a fair and impartial trial, and it is not intended to make a final determination of the charges on the merits. *People ex rel. Long v. Whitney*, 143 App. Div. 17.

An honorably discharged United States soldier, who was not a veteran of the Civil or Spanish war, holding a position within the classified civil service of the city of New York subject to competitive examination is not entitled, before being removed from his position, to a trial and hearing upon specified charges; but his sole right is that conferred upon him by section 1543 of the Greater New York charter, namely, to have an opportunity to explain and to have the reasons for his removal specified in writing.

If he is accorded a trial the only effect thereof is to enlarge his opportunity to make an explanation, and a writ of certiorari will not lie to review the proceedings had on the trial. *People ex rel. O'Keefe v. Hynes*, 101 App. Div. 454, 91 Supp. 1032.

Subd. 11. To Military Board.

Certiorari will not lie to review the action of the Governor, as commander-in-chief, in disbanding a company of militia under the Military Code. *People ex rel. v. Hill*, 59 Hun, 624, 13 Supp. 186, 637; *aff'd*, 126 N. Y. 497.

The writ lies to review proceedings of a court-martial convicting the relator. *People v. Townsend*, 10 Abb. N. C. 69; *Matter of Brackett*, 27 Hun, 605. But the decision of a court-martial cannot be reviewed on certiorari if the court had jurisdiction of the subject-matter and of the person of the accused, and if there was any evidence in support of the charges and specifications. *People ex rel. v. Rand*, 41 Hun, 529, 5 St. Rep. 31.

The board of examination appointed under the Military Code, section 64, to determine the general fitness of a person for service as commissioned officer in the National Guard of the State, acts judicially in the matter, subjecting its action to review in the civil courts by certiorari; but it cannot review the order appointing the board. *People ex rel. Smith v. Phisterer*, 66 App. Div. 52, 73 Supp. 124.

Unless military tribunals are excepted from the general rule their judicial determinations are subject to review by means of this ancient and important writ; they are not expressly excepted either by the Military Code or the Code of Civil Procedure. *People ex rel. Smith v. Hoffman*, 166 N. Y. 462 (472), *rev'g* 55 App. Div. 260, 68 Supp. 884.

The members of a military board of examination and the Adjutant-General as the custodian of its record and report are the proper parties to whom the writ of certiorari should be directed; but the Governor whose action upon its findings is executive is not a proper

party. *People ex rel. Smith v. Hoffman*, 166 N. Y. 462, rev'g 55 App. Div. 260, 68 Supp. 884.

Subd. 12. To Review Removal of Teachers.

The action of the State Superintendent of Public Instruction in removing a trustee of a school district is reviewable upon certiorari.

The decisions of the Superintendent, which under the provisions of the Consolidated School Law are made final and exempt from review by the courts, are those upon appeals to him from the decisions of local officers in the administration of the laws relating to the common schools. The provision of the statute exempting his decisions made upon such appeals from review by the courts has no application to an order made by him in the first instance removing school officers from office. *People ex rel. Light v. Skinner*, 159 N. Y. 162, aff'g 37 App. Div. 44, 55 Supp. 337.

A teacher in the public schools of New York city removed after a hearing by the board of school superintendents (constituted by L. 1896, chap. 387, § 18), in accordance with section 26, requiring the approval of the school inspectors of the district, and whose appeal taken to the board of education and referred to the school board for the boroughs of Manhattan and the Bronx, was dismissed; *held*, not entitled to a writ of certiorari, since the approval of the school inspectors made the removal final subject to an appeal to the board of education; and the court has no power to review the action of the board of school superintendents or of the inspectors of the district. *People ex rel. Everitt v. Hubbell*, 38 App. Div. 194, 56 Supp. 642.

The school board of the borough of Queens in the city of New York, having power to remove a janitor on the complaint of one of its members without a hearing, the fact that he was given a hearing, or that one of the by-laws of the school board provided for complaint to, and hearing by, a committee of its own body, does not make the action of the board judicial, and it is not subject to review by certiorari. *People ex rel. Purcell v. Simonson*, 66 App. Div. 18, 72 Supp. 957.

Where the mayor of a city removes a school commissioner by an order reciting that the act is for the good of the schools, without any hearing or any proceedings taken, the removal does not include a judicial determination, and the right of the mayor to remove such officer cannot be reviewed by certiorari. *People ex rel. Howe v. Conway*, 59 App. Div. 329, 69 Supp. 837.

The decision of board of education of New York city in removing a teacher cannot be reviewed, as the power of the board is discretionary. *People v. Bd. of Education*, 3 Hun, 177.

Whether a default shall be opened and a rehearing had where a teacher has been dismissed by a board of education, and has failed to appear at the time set for a hearing, is purely a matter of discretion of the board of education, and, therefore, their determination is not subject to revision and reversal by another tribunal. "Certiorari to compel the concession of a favor would be an anomaly in jurisprudence." *Jordan v. Bd. of Education*, 14 Misc. 119, 69 St. Rep. 623, 25 Civ. Pro. 89.

As the principal of a public school in the city of Troy has an appeal from the decision of the board of education removing him from his position to the Commissioner of Education, under the provisions of title 14 of the Consolidated School Law (as amended by L. 1904, chap. 40), a writ of certiorari cannot be issued to review the decision of the board. *People ex rel. Walrath v. O'Brien*, 112 App. Div. 97, 97 Supp. 1115.

The action of the board of education of the city of New York, refusing the application of a teacher in one of the public schools of the borough of Brooklyn for a license to enable her to teach in a higher grade than she was employed in, not being a judicial act, is not reviewable by certiorari. *Walker v. Maxwell*, 68 App. Div. 196, 74 Supp. 94, dist'g *People ex rel. Smith v. Hoffman*, 166 N. Y. 462.

Upon a trial of a janitor of a public school in the city of New York upon charges of a violation of a rule of the board of education, its determination approving the action of a committee thereof adjudging the janitor guilty and imposing a fine of seventy-six days' pay, the amount of which was withheld from his salary, is a judgment finally determining the questions involved, and not subject to collateral attack in an action by him to recover the amount of the fine so withheld.

If plaintiff had any valid grievance to redress, the proper and exclusive remedy was a review by writ of certiorari of the proceedings of the board of education. *Egan v. Bd. of Education of New York*, 70 Misc. 518.

Subd. 13. Certiorari to Public Service Commission.

The right to review the action of this body is treated under "Public Service Commission."

Subd. 14. To Review Assessment for Local Improvements.

Certiorari lies to review a municipal assessment for a local improvement where there has been an essential departure from the

statute in principle of assessment. *Leroy v. Mayor of New York*, 20 Johns. 430; *Starr v. Trustees of Rochester*, 6 Wend. 564; *People v. City of Rochester*, 21 Barb. 656. See *Ex parte Mayor of Albany*, 23 Wend. 277. To vacate an assessment on the ground that the assessors erred in their determination as to what property was benefited, the remedy is by certiorari, not by suit in equity, but otherwise if the assessors proceed on a wrong rule of law. *Kennedy v. City of Troy*, 77 N. Y. 493.

It has been granted to review assessment for opening a sewer; for paving streets; for grading avenues; for the construction of a bridge. *People v. Mayor of Brooklyn*, 9 Barb. 535; *People v. City of Brooklyn*, 49 Barb. 136; *People v. City of Rochester*, 21 Barb. 656; *Bouton v. President, etc.*, 2 Wend. 395; *Leroy v. Mayor*, 20 Johns. 430; *Ex parte Mayor of Albany*, 23 Wend. 277; *People v. City of Utica*, 65 Barb. 9. It is held in *People v. Bd. of Assess.*, 2 Hun, 583, that the writ will be granted only to review assessments on special cause shown, and will be superseded if it appears the remedy sought is against justice and convenience. Also in the *Matter of Eightieth St.*, 17 Abb. 324, that the writ should be refused in case of a local improvement when there is another adequate remedy. It is held in *People v. McDonald*, 4 Hun, 187; aff'd in 69 N. Y. 362, that certiorari should not be granted on the application of two or three out of a large number of persons interested in like manner in assessments for local purposes, especially where adequate relief is afforded in proceedings at law, and this is in conformity with the earlier decisions. In the *Matter of Mt. Morris Square*, 2 Hill, 14, that in general the court ought not to allow the writ where assessments of taxes or awards of damages are in question, which affect any considerable number of persons. It is said in that case that if there be a want of jurisdiction even in the judicial act sought to be reviewed, or, in other words, if there be any excess of legal power by which a person's rights may be injuriously affected, an action lies, and it is much better that he should be put to this remedy than that the whole proceeding should be arrested, and perhaps finally reversed for such a cause.

It seems that the determination of the board of assessors as to who was benefited by an improvement, and the extent of such benefit, of which questions they are made exclusive judges by the city charter, cannot be reviewed upon certiorari except for errors of law. *People ex rel. Davidson v. Gilon*, 126 N. Y. 157; *People ex rel. James v. Gilon*, 37 St. Rep. 23.

A failure of the board of assessors, in assessing damages for the change in grade of a street for the construction of bridge approaches under the Laws of 1896 (p. 865, chap. 716), to hold that there had been a former recovery by the claimant of the same damages, is, if erroneous, an error of law which may be reviewed by certiorari. *People ex rel. City of New York v. Lawrence*, 48 Misc. 52, 94 Supp. 920.

The writ of certiorari is an appropriate remedy to review proceedings for the opening and grading of streets. Although there is no statutory limitation of time within which the writ must be obtained, it is not one of right, and the court can, in its discretion, refuse it in any case and quash it where it has been improperly granted. *People ex rel. Ackerly v. City of Brooklyn*, 8 Hun, 56.

Under the charter of the city of Buffalo the determination by the board of assessors of the question whether property of a railroad company is benefited by the grading of a contiguous street is reviewable by certiorari, under section 101 of the charter; and an action, under section 100 of the charter, which is in the nature of an action to remove a cloud upon title does not lie. *N. Y. C. & H. R. R. R. Co. v. City of Buffalo*, 67 Misc. 642, 122 Supp. 1058.

On certiorari to review an assessment for a street improvement, the objection that the premises assessed were not benefited does not present a question of law, unless the determination fixing the assessment district was not supported by competent proof, or was opposed by a strong preponderance of the evidence; Code of Civil Procedure, section 2140, providing that the questions to be determined by the court on the hearing shall be whether there was any competent proof authorizing the determination or, if there was, whether there was a preponderance against it. *Matter of Phelps*, 110 App. Div. 69, 96 Supp. 862.

The issues of fact joined upon the return to a writ of certiorari to review an assessment for a local improvement in the city of Buffalo, tried in the Superior Court of that city before the Special Term thereof, should be decided, and the decision made a part of the judgment-roll, under the Code of Civil Procedure, section 1022, and not under section 2141, which is for the determination of common-law writs by the Appellate Division and not for the determination of disputed questions of fact. *People ex rel. Palen v. City of Buffalo*, 39 App. Div. 245, 57 Supp. 261.

Upon a common-law certiorari to review an assessment for a public improvement, if it appears from the record that, as a matter of

fact, the assessment of the relator's property is unequal as compared with the assessment of other similar property similarly situated, and is unjust, the court is at liberty to correct such assessment even though the rule or general principle upon which the assessment was made is not an illegal or erroneous one. *People ex rel. Connelly v. Reis*, 109 App. Div. 748, 96 Supp. 597.

A petition for a writ of certiorari to review an assessment for a municipal improvement, which alleges that the assessment is void for the reason that it is not made "in compliance with the general or special provisions of law for the levying" of such assessment, is insufficient to present the objection that the contract for the work was not made before the assessment was levied as required by the provisions of the city charter. *People ex rel. Lehigh Valley Ry. Co. v. City of Buffalo*, 57 Misc. 10, 107 Supp. 689.

A decision, under the Code of Civil Procedure, section 1022, vacating an assessment for a city improvement, which virtually determined the only question of fact in the case, *held*, to present a sufficient finding thereon. *People ex rel. Tiffany v. City of Buffalo*, 39 App. Div. 651, 57 Supp. 263; *aff'd* without opinion, 159 N. Y. 571.

Semble, that where the action of the board of assessors in rejecting the claim has been confirmed by the board of revision of assessments, such confirmation is final in the absence of any fraud or violation of law affecting the result; and a writ of certiorari will not be issued to review the determination made by the board of assessors and by the board of revision of assessments where the claimant's sole contention is that upon the evidence the determination was erroneous. *People ex rel. Rothschild v. Muh*, 101 App. Div. 423, 92 Supp. 22; *aff'd*, 183 N. Y. 540.

Subd. 15. To Review Proceedings for Contempt.

A precedent is given under article XIII, but this subject is fully treated under title "Contempt."

ARTICLE III.

WHAT COURT MAY ISSUE WRIT AND WITHIN WHAT TIME. §§ 2123, 2124, 2125, 2126.

§ 2123. *When issued from Supreme Court*, 291.

§ 2124. *When from another court*, 292.

§ 2125. *Limitation of time for review*, 292.

§ 2126. *Id.*; *in case of disability*, 292.

§ 2123. *When issued from supreme court.*

A writ of certiorari can be issued only out of the Supreme Court, except in a case where another court is expressly authorized by statute to issue it.

§ 2124. When from another court.

Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of certiorari, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

§ 2125. Limitation of time for review.

Subject to the provisions of the next section, a writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

§ 2126. *Id.*; in case of disability.

The appellate division of the Supreme Court may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life.

Where an appeal is taken to the Appellate Division under section 62 of the Railroad Law, from a determination of the common council of a city to lay out a new street across the right of way of a steam surface railroad, and the parties are unable to agree as to the record to be submitted on the appeal, a writ of certiorari will be issued under section 2124 of the Code of Civil Procedure, requiring the common council of the city to return to the court all the papers and proceedings upon which it acted in making the determination. *Matter of Delavan Avenue*, 62 App. Div. 492.

Code of Civil Procedure, section 2125, provides that a writ of certiorari to review a determination must be granted and served within four calendar months after the determination becomes final and binding on the relator; *held*, that where the position of battalion chief in the fire department of the city of Buffalo was placed in the competitive class in 1899, and on July 11, 1904, an appointment to such office was made without competitive examination, a writ of certiorari issued in August following, on the relation of the appointee, to review the action of placing such position in the competitive class was in time. *People ex rel. Schau v. Whittet*, 100 App. Div. 176, 91 Supp. 675; rev'd on other grounds, 185 N. Y. 92.

In order to obtain a review of the action of a board of town auditors the writ must be procured while the board yet retains juris-

diction of the proceedings; and service thereof after the board has completed its audit, delivered its certificates and abstract to the town supervisor, and adjourned *sine die*, is ineffectual. *People ex rel. Jonas v. Town Auditors of Hempstead*, 49 App. Div. 4, 63 Supp. 114.

Under the Code of Civil Procedure, section 2125, permitting a writ of certiorari to be issued within four calendar months after the determination to be reviewed becomes final and binding — it is no objection to the issuance of a writ within that period to review the action of a town board that such board had adjourned before the issuance of the writ. *People ex rel. Village of Brockport v. Sutphin*, 166 N. Y. 163; modif'd, 53 App. Div. 613, 66 Supp. 49.

Where the action of a town board upon a claim was sought to be reviewed by mandamus, and the determination made that the writ issue was reversed upon appeal, on the ground the claimant's remedy was by certiorari, and within two months after the decision of the Court of Appeals and within a year after that of the Appellate Division certiorari proceedings were brought; *held*, that they were not barred by the four months' limitation, under the Code of Civil Procedure, section 2125, but fell within the provisions of section 405. *People ex rel. McCabe v. Snedeker*, 106 App. Div. 89, 94 Supp. 319.

Notice of removal of a uniformed member of the department of street cleaning of the city of New York must be brought home to the relator before the provisions of the Code of Civil Procedure, section 2125, requiring the writ of certiorari to be sued out and served within four calendar months after the determination to be reviewed became final and binding upon the relator, affect the relator. *People ex rel. Lahey v. Woodbury*, 102 App. Div. 333, 92 Supp. 444.

A determination by the railroad commissioners that a certificate of public convenience and necessity shall issue is a final determination of the rights of the owners of land through which the railroad will pass, if constructed, as to the question of public convenience and necessity; and hence they are not affected by the limitation upon the issuance of the writ of certiorari imposed by subdivision 1 of section 2122 of the Code of Civil Procedure. *People ex rel. Steward v. R. R. Com'rs*, 160 N. Y. 202, aff'g 40 App. Div. 559, 58 Supp. 94.

The limitation of four months prescribed by the Code of Civil Procedure, section 2125, does not begin to run until the effective determination of the board whose action is sought to be reviewed by the issuance of its formal certificate. *People ex rel. N. Y. C., etc.*,

R. R. Co. v. Public Service Com'rs, 195 N. Y. 157, aff'g 122 App. Div. 283, 106 Supp. 968.

The time to apply for a writ of certiorari to review an order of highway commissioners laying out a highway, as fixed by the Code of Civil Procedure, section 2125, providing that a writ of certiorari to review the determination of commissioners laying out a highway, must be granted within four months after the determination becomes final and binding on the relator, does not begin to run until the order laying out the highway is recorded in the town clerk's office as required by the Laws of 1890 (pp. 1192, 1193, chap. 568, §§ 80, 81). *People ex rel. Dinsmore v. Vandewater*, 83 App. Div. 60, 82 Supp. 626.

Under the New York city charter of 1897, which limits to two years the time within which a dismissed member of the police force may institute a proceeding for reinstatement, only one who was a member of the police force at the time the charter took effect, or thereafter, is entitled to the benefit of the two years' limitation; a member of the police force of a village incorporated in the city, who was dismissed in the month preceding, is limited by the Code of Civil Procedure, section 2125, to four months thereafter. *People ex rel. Tucker v. York*, 47 App. Div. 552, 62 Supp. 662.

Where notice of motion for a writ of certiorari is served within the four months after the determination sought to be reviewed, though the application was not heard until after the four months had elapsed, if objection of the Statute of Limitations is not taken at the hearing it will not be available upon appeal. *People ex rel. O'Shea v. Lantry*, 44 App. Div. 392, 60 Supp. 1009.

The collection of an assessment will not be restrained by an injunction where the plaintiff has lost the remedy by certiorari to review the same, owing to the running of the limitation of section 2125, Code of Civil Procedure. *Postal Tel. Cable Co. v. Grant*, 11 Supp. 323. The provision of section 413 of the Code of Civil Procedure, which provides that the Statute of Limitations can only be taken advantage of by answer, does not apply to the limitation to certiorari provided for in section 2125, Code of Civil Procedure; and, therefore, it is not necessary to take advantage of such section by setting it up in the return. Such writ, therefore, served after the expiration of the time limitation may be quashed upon motion of the defendant. *People ex rel. Conner v. Purroy*, 19 Supp. 907, 22 Civ. Pro. 116. See further on this point, *People ex rel. McNeary v. MacLean*, 64 Hun, 206, 19 Supp. 56, 46 St. Rep. 99, where the

court says: "It is urged that the only method in which the appellants could claim the advantage of the Statute of Limitations contained in section 2125 is by setting the same up in the return. It is apparent that such cannot be the rule, because the Code requires no defense to the issuance of the writ to be returned, but simply the proceedings upon which the judgment of the inferior tribunal was founded. Where it appears upon the face of the petition that the statute has run, it is not necessary that the fact should be brought before the court in any other manner. The statutory limitation of four months of section 2125, Code Civil Procedure, within which certiorari must be brought to review the decision of a board, begins to run against the refusal of police commissioners to reconsider their action in accepting the resignation of a policeman from the date of the refusal to reconsider and not from the date of accepting the resignation. *People ex rel. Goodwin v. Martin*, 30 Supp. 1107, 82 Hun, 6, 63 St. Rep. 298. But compare 66 Hun, 93, 20 Supp. 944, 49 St. Rep. 739. The expiration of the four months' limitation in section 2125 opposes an insuperable bar to the issuance of the writ of certiorari. *Jordan v. Bd. of Education*, 14 Misc. 119, 69 St. Rep. 623, 25 Civ. Pro. 89. It seems that where an improper classification of civil service positions has been made by a mayor, certiorari to review the same must be brought within four months from the time of such classification. *Chittenden v. Wurster*, 152 N. Y. 345.

Before the enactment of sections 2125 and 2126, Code of Civil Procedure, there was no statute or rule of law prescribing any fixed period within which certiorari must be applied for, and the granting of the same was always a matter of discretion. *People ex rel. Smith v. Cooper*, 22 Hun, 515. The provision of chapter 457 of the Laws of 1881, which required that a writ of certiorari to review the determination of police commissioners removing a member of the police force must be granted and served within thirty days after the relator was notified of his removal, is not enlarged by the four months' limitation, given by section 2125, Code of Civil Procedure. These statutory provisions are not inconsistent though they describe different limitations; and the special limitation of the Laws of 1881 is of paramount authority in any case arising thereunder. *People ex rel. Dunnigan v. Com'rs of Police*, 47 Hun, 408; aff'd without opinion, 110 N. Y. 681. Where a relator in certiorari proceedings is out on bail and had full liberty pending an indictment, he is subject to the four months' limitation of section 2125, and cannot avail himself of the enlargement of time given by subdivision 3, section

2126. *Matter of Squire v. City of N. Y.*, 16 St. Rep. 946, 3 Supp. 141. The four months' limitation of section 2125 applies to certiorari brought on the ground of a lack of jurisdiction as well as if brought on any other ground. *People ex rel. Springsted v. Trustees of Cobleskill*, 49 St. Rep. 48, 20 Supp. 920. Under the limitation of this section certiorari will not lie to review the action of dock commissioners in removing the relator from the position of book-keeper, after four months from such determination and notice thereof to the relator. *People ex rel. Perry v. Stark*, 52 Hun, 611, 4 Supp. 820.

Where no notice of the final completion of the assessment-roll has been given, the time to apply for a certiorari to review it is unlimited. *People ex rel. Swartwout v. Village of Port Jervis*, 23 Misc. 317, 52 Supp. 59, 86 St. Rep. 59.

Though the four months' limitation of section 2125 is extended to twenty months, where the relator is imprisoned on a criminal charge, yet one who is out on bail during the four months following his indictment is not entitled to this extension by section 2126. *People ex rel. v. City of New York*, 49 Hun, 607.

It is too late to obtain a writ of certiorari against a board of supervisors to review their proceedings in allowing a claim alleged to be illegal, if the warrant for the collection of taxes has been signed, and the money collected. *People v. Supervisors of Rensselaer*, 34 Hun, 266.

As to whether the determination by commissioners of city works in levying an assessment for a sewer is final and binding upon the relator within the meaning of section 2125, see *People ex rel. Tabor v. Adams*, 45 St. Rep. 270, 18 Supp. 441. Proceedings by certiorari may be instituted at any time within four months after the right accrues. *Martin v. Simons*, 4 Misc. 8.

The right to certiorari is a right which accrues when the determination to be reviewed becomes final and binding upon the relator, and it must be granted within four calendar months after the determination to be reviewed becomes thus final and binding. *People ex rel. Bronx Gas Co. v. Barker*, 22 App. Div. 165, appeal dism'd, 155 N. Y. 308. It seems that proceedings taken by certiorari issued on the 3d of September to review a determination of a department of public parks in New York, which became final on the 30th day of April, is barred by section 2125. *People ex rel. Trap-hagen v. King*, 13 App. Div. 401.

A determination of commissioners of highways laying out a highway is final and binding when made, recorded, and posted, and brings the matter under the limitation of section 2125, Code of Civil Procedure, requiring the writ to be served within four months after such determination; the fact that an appeal has been brought to review such determination does not suspend during its pendency the running of the statute. *People ex rel. Cook v. Hildreth*, 126 N. Y. 361, 37 St. Rep. 394.

Code of Civil Procedure, section 2125, provides that certiorari to review a determination must be served within four months after the determination to be reviewed becomes final; *held*, that the statute is not solely one of limitations, and certiorari would lie to review the action of a town board of audit in reducing the compensation of a health officer from the salary fixed in pursuance of law, notwithstanding the claim had passed on to the board of supervisors in regular order from the board of audit. *People ex rel. Leitner v. Sipple*, 109 App. Div. 788, 96 Supp. 897.

ARTICLE IV.

PETITION, BY WHOM MADE AND NOTICE OF APPLICATION FOR THE WRIT. §§ 2127, 2128.

§ 2127. *Application for writ; where and how made*, 297.

§ 2128. *When notice necessary; service thereof*, 297.

§ 2127. *Application for writ; where and how made.*

An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed; must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a term of the appellate division of the Supreme Court or at Special Term; and the granting or refusal thereof is discretionary with the court.

§ 2128. *When notice necessary; service thereof.*

Until provision is made, in the general rules of practice, for requiring, or dispensing with notice of the application for the writ, the court to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the papers upon which the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of certiorari. The service must be made, at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

In proceedings by certiorari it is only the hearing of the merits which is to be had at the General Term. All incidental motions should be heard at Special Term. *People ex rel. McNeary v. MacLean*, 64 Hun, 206, 19 Supp. 56, 46 St. Rep. 99.

The writ can only be granted at a General or a Special Term of the court; but when the order granting the writ shows by the caption that the writ was regularly granted at Special Term, at a time and place when a term for hearing *ex parte* motions might have held, and that it was allowed by one of the justices of the court, this should be held conclusive on a motion to quash. *People ex rel. Burhans v. Supervisors of Ulster*, 19 Week. Dig. 208. The fact that the application for the writ may be made either at Special Term or in the Appellate Division does not affect the right of the latter court to review a Special Term decision, though the application was first made to the Special Term. *Matter of Light*, 30 App. Div. 52, dist'g *Boechat v. Brown*, 9 App. Div. 369.

The application for the writ was formerly founded on affidavit. *Fitch v. McDowell*, 7 Cow. 537. Cause must be shown in all cases where certiorari is brought to review the proceedings of an inferior tribunal for error. It is never granted, of course, except when sued out by the people. *Munn v. Baker*, 6 Cow. 396. Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. *People v. Mayor*, 5 Barb. 43; *Conover v. Derlin*, 24 Barb. 641. When granted upon mere suggestion without affidavit, the writ was quashed on application of defendant. *Bogert v. Mayor of N. Y.*, 7 Cow. 158; *Comstock v. Porter*, 5 Wend. 98. The affidavit should not be entitled. *Haight v. Turner*, 2 Johns. 371; *Whitney v. Warner*, 2 Cow. 499.

A petition on certiorari should not be quashed because it sets out other grounds not material to the questions involved, where it does clearly state adequate grounds of complaint. *People ex rel. v. McComber*, 7 Supp. 71. The Forest Commission has been a continuous body since its creation, and it is a proper relator in certiorari proceedings under section 2127, Code of Civil Procedure, and such commission may act in the names of the individual members composing it, or may act as a body. *People ex rel. Forest Com. v. Campbell*, 152 N. Y. 56, rev'g 82 Hun, 338, 614, 64 St. Rep. 98, 31 Supp. 449.

The relator bringing a proceeding for reinstatement in public office must allege more than that on a day specified he was duly appointed to the office, which is merely a conclusion, and must set forth the facts making his appointment legal, as that he passed the requisite civil service examination; as otherwise he may have been an officer

de facto only. *Matter of Meehan v. Flaherty*, 119 App. Div. 128, 103 Supp. 1058.

Matter not assigned as error in a petition for certiorari will not be considered in the review. *People v. Scannell*, 56 App. Div. 51, 67 Supp. 433.

An allegation in the petition that the relator is informed and believes that certain affidavits were considered upon the hearing of the matter sought to be reviewed, without disclosing the source of the information and the grounds of belief, does not call upon the respondent for a categorical denial, and the omission of such denial does not amount to an admission of the principal fact.

Where the affiants have been called as witnesses and an opportunity given for their cross-examination, and it does not appear that the statements contained in their affidavits were other than those testified to upon the trial, the fact that they were considered by the commissioner will not authorize a reversal of his determination. *People ex rel. Rosenberg v. Greene*, 101 App. Div. 33, 91 Supp. 803.

An application for a writ of certiorari must be made by or in behalf of a person aggrieved by the determination to be reviewed. *People ex rel. Sweet v. Raymond*, 131 App. Div. 160, 115 Supp. 275.

A petition for a writ of certiorari under the Code of Civil Procedure, section 2127, "by or in behalf of a person aggrieved by the determination to be reviewed" may be verified by the attorney whose authority will be presumed. *Matter of Belmont*, 40 Misc. 133, 81 Supp. 280; *aff'd*, 83 App. Div. 643, 82 Supp. 1110.

It appears upon the face of the papers in proceedings of certiorari to review the relator's removal from an office, that he was never entitled to the office, he is not "a person aggrieved by the determination to be reviewed," and is not entitled to the writ under section 2127, Code of Civil Procedure. *People ex rel. Russell v. The Com'rs*, 76 Hun, 149, 57 St. Rep. 305. Section 2127, Code of Civil Procedure, merely embodies the pre-existing practice of the courts as to its discretion in issuing certiorari. A person not owning the adjoining lands, and having no grant of lands under the waters of a navigable river, is not a party aggrieved by the decision of the Commissioners of the Land Office granting such lands, and is, therefore, not entitled to review the same by certiorari. *People ex rel. Blakslee v. Com'rs*, 135 N. Y. 449, 48 St. Rep. 433.

The board of fire commissioners of Auburn has power to dissolve volunteer hose companies, and "a person aggrieved" within the meaning of section 2127 of the Code, relating to certiorari, does not

include a member of such company. *People ex rel. Healey v. Fire Com'rs*, 27 App. Div. 530, 50 Supp. 506, 84 St. Rep. 506. Where the allegations of the petition and the writ are indefinite the remedy is by motion, before filing the return, to make them more definite and certain. *People ex rel. N. Y. C. & H. R. R. Co. v. Budlong*, 25 App. Div. 373, 49 Supp. 484, 83 St. Rep. 484.

Where the common council of the city of New Rochelle, pursuant to the charter, has designated two political newspapers as representing the two principal political parties of the city, the publisher of a newspaper not designated, claiming that his paper rather than one designated represents one of the principal political parties, cannot review the determination by certiorari in the absence of proof that there are no other papers in the city which fairly represent that party, for he is not a "party aggrieved" within the meaning of section 2127 of the Code of Civil Procedure. Moreover, where the period for which the appointments were made has expired and the applicant has not published any official notices, he is not entitled to the writ, for even if the designations were erroneous the city would not be liable to him for services rendered. *People ex rel. Sweet v. Raymond*, 131 App. Div. 160, 115 Supp. 275.

ARTICLE V.

THE WRIT, TO WHOM DIRECTED AND STAY THEREON. §§ 2129, 2131.

§ 2129. *To whom writ directed*, 300.

§ 2131. *Stay of proceedings*, 300.

§ 2129. To whom writ directed.

The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body in its associate or official name, it must be directed to the board or body, by that name; otherwise it must be directed to the members thereof, by their names.

§ 2131. Stay of proceedings.

Except as prescribed in this section, a writ of certiorari does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may in its discretion, and upon such terms, as to the security or otherwise as justice requires, direct by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the certiorari, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in section 2137 of this act.

The writ must be directed to all persons whose return is necessary to enable the court to determine the regularity or validity of pro-

ceedings of the officer or tribunal sought to be reviewed. Each officer, body, or board can make return as to his part of the matters done. But this is confined to cases where several officers or boards are required to perform separate acts which make up one official transaction, as assessors, commissioners, and county judges, on proceedings for bonding towns. *People v. Hill*, 65 Barb. 170. But, on the other hand, where the acts of single officers do not go to make parts of and complete a single transaction, and constitute one entire official act, separate writs must issue to each body or officer whose acts contribute to the completion of the act complained of. *Matter of Woodbine Street*, 17 Abb. 112. Certiorari must run to a board of village trustees, and not to the corporation as such, where the action of the trustees is sought to be reviewed. *People v. Trustees*, 1 Hun, 593. It was formerly held that a certiorari to a board of police would not run to the individual, but to the board as a body. *People v. Chollwell*, 6 Abb. 151. The writ should run to individual overseers of the poor, and not to them in their official capacity. *Overseers of Greenville v. Bishop*, 2 How. 195. And to correct errors of a board of assessors or revision, certiorari must run to the board and not to the corporation. *People v. Mayor*, 19 Hun, 73. Where the writ was against a mere department of the city government, it must be directed to the members of such board by their individual names; so held as to the commissioner of public parks, on ground it is not a corporation and action is not authorized against it in its official capacity. *People v. Com'rs*, 97 N. Y. 37. To review an order of commissioners of highways, directing the removal of an encroachment, it must be directed to the commissioners. *People v. Com'rs of Highways*, 30 N. Y. 72. But certiorari directed to different officers having no joint or common duties, but acting independently, is bad. *People v. Walter*, 68 N. Y. 403. A writ to review the proceedings of a judge out of court should be directed to the judge, and not to the court of which he is a member. *People v. Kelly*, 35 Barb. 444. The writ will properly issue to a judge to review proceedings on town bonding, even after the proceedings have been completed and the record filed with the county clerk. *People v. Smith*, 45 N. Y. 772, dist'g *People v. Com'rs of E. Hampton*, 30 N. Y. 72. It is held in *People v. Hill*, 65 Barb. 170, that, although ministerial acts enter into and form part of the act complained of the writ is properly directed to the officer or body so acting, but that the writ does not issue to review purely ministerial acts. The writ may be directed to one whose term of office has expired. *Harris v. Whitney*, 6 How. Pr. 175; *People v. Hill*, 65 Barb. 170; *Conover v. Devlin*, 15 How. Pr. 470.

A writ of certiorari must be addressed to the board of assessors, or to all the members of the board, and not merely to those who signed the roll. *People ex rel. Benedict v. Roe*, 25 App. Div. 107, 49 Supp. 227, 83 St. Rep. 227.

The writ must run in the name of the people, and cannot be prosecuted in the name of an individual alone. *Wildy v. Washburn*, 16 Johns. 49; *People v. Judges of Suffolk*, 24 Wend. 249. It should recite the names of the parties aggrieved and set forth the cause of complaint with the proceedings, and the wish of the people to be certified of them, and directing the judge or other officer or tribunal to certify and return the record to the Supreme Court at a specified time named therein as the return day of the writ, so that the court may then and there cause to be done what of right ought to be done, and directed to the tribunal whose proceedings are sought to be reviewed. *People v. Cholwell*, 6 Abb. 151. The writ should be tested, signed, and sealed, and an indorsement made upon it signed by the clerk, showing that the writ had issued by order of the court. 2 Burn. Pr. 195; *Mott v. Com'rs of Highways*, 19 Wend. 640.

The order for the writ is the authority for the clerk to sign the indorsement and affix the seal.

Where a permanent official body is created by statute without any limit as to time, the court may review the decision of such a board, although the individuals who made it have ceased to be officers, and a record of their proceedings has passed into the custody of some other authority. In such a case the person holding the record should be made a party to the writ, in order to place the record before the court. *People ex rel. Heiser v. Gilon*, 121 N. Y. 559, 31 St. Rep. 894. If the record of decision which is desired to be reviewed is in the hands of persons other than those making the decision, the writ may, by the authority of section 2129, Code of Civil Procedure, be sent to any body which has any paper to be certified in relation to the writ. *People ex rel. Cook v. Hildreth*, 5 Supp. 308. Where the writ issues against the common council of the city to review its decision in designating a newspaper for public printing, the mayor of the city is properly made a party, although he had no voice, vote, or veto in the decision, as he was required by the charter of the city to authenticate the acts of the common council. *People ex rel. Francis v. Mead*, 17 St. Rep. 661, 2 Supp. 114. Though section 2136, Code of Civil Procedure, provides that certiorari may issue against an officer whose term of office has expired, yet where the office is a continuing public office, such as a Comptroller of the State, it properly issues to the person incumbent of the office to review the proceed-

ings of his predecessor under the provisions of section 2129. *Matter of the Tax Com'rs v. Tiffany & Co.*, 80 Hun, 488, 62 St. Rep. 394, 30 Supp. 494. The provision in section 2129, Code of Civil Procedure, that the writ may issue to any person having the custody of the record, or other papers to be certified, as well as to the board or persons making the decision to be reviewed, is intended to prevent a failure of justice "through the shuffling of the roll around from one person or officer to another, before its purpose could be made effectual by its service." Thus in reviewing the proceedings of assessors, the town clerk having possession of the assessment-roll is a proper party. *People ex rel. v. Burhans*, 25 Hun, 186.

Where the respondent in certiorari is a mere department of the city government, and no action could be brought against it by its official name, a writ directed to such board is irregular; it should be directed to the members of the board "by their names." *People ex rel. R. R. Co. v. Bd. of Com'rs, etc.*, 97 N. Y. 43. It seems that the direction of the writ of certiorari to persons who composed a majority of the Democratic members of a board of supervisors, which majority made the determination complained of, is not improper under provisions of section 2129. *People ex rel. Baldwin v. Barnes*, 17 App. Div. 202.

Where the city department whose decision is sought to be reviewed is an incorporated body, able to sue or be sued in its own name, the writ of certiorari properly issues against it, under its corporate name. *People ex rel. Fitzgibbons v. Trustees*, 1 App. Div. 187, dist'g 97 N. Y. 37, *supra*. Where the body whose decision is to be reviewed is still legal custodian of the record thereof, and has not delivered the same to any other party by virtue of a statute, the writ of certiorari lies against it. *People ex rel. N. Y., O. & W. R. R. Co. v. Chapin*, 3 St. Rep. 725, dist'g *People ex rel. Marsh v. Delaney*, 49 N. Y. 655; *People ex rel. Law v. Com'rs*, 9 Hun, 609; *People ex rel. Weeks v. Supervisors*, 82 N. Y. 275.

An order allowing a writ of certiorari to review a determination of the fire commissioner of the city of New York dismissing for cause and after a hearing the chief of the city fire department should not contain a provision staying execution of the determination until review had.

The stay will be vacated on motion where it has been granted *ex parte*.

The stay cannot be supported upon the ground of alleged erroneous rulings of the commissioner, nor because his determination is alleged to be against the law and the weight of evidence, and this because

those questions are for the Appellate Division. Code Civ. Pro., § 2140.

The stay cannot be supported upon the ground of the commissioner's alleged bias or prejudice, where the court at Special Term cannot determine from the record that, assuming they existed, they affected the result.

A stay should not be granted in such a case as a matter of course, as the interests of the public service require that there should be no stay.

Code of Civil Procedure, section 2131, has not enlarged the right to have a stay in a writ of certiorari, or an order for a stay, but has limited it, and thus has changed the common-law rule under which the writ itself involved a stay and effected it. *People ex rel. Croker v. Sturgis*, 39 Misc. 448, 80 Supp. 194.

Section 2131 of the Code of Civil Procedure, providing for a stay of proceedings under the determination sought to be reviewed, seems to require that such order for stay should accompany the writ, and be a part of it. It seems that it will be refused where much time has elapsed since the issuance of the writ. *People ex rel. N. Y., etc., R. R. Co. v. Bd. of Aldermen*, 10 Abb. N. C. 34. Staying of proceedings by separate order was affirmed on appeal in *People ex rel. Burhans v. Supervisors*, 19 Week. Dig. 208. The writ does not operate *per se* as a stay. *People v. Supervisors of Albany*, 23 Week. Dig. 568.

ARTICLE VI.

PROCEEDINGS UPON THE WRIT AND MATTERS OF PRACTICE §§ 2130, 2132, 2133, 2137.

§ 2130. *Mode of service*, 304

§ 2132. *When and where writ returnable*, 304.

§ 2133. *Subsequent proceedings as in an action*, 305.

§ 2137. *When third person may be brought in*, 305.

§ 2132. *When and where writ returnable.*

A writ of certiorari must be made returnable, within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the Supreme Court, it must be made returnable at the office of the clerk of the county designated therein, wherein the determination to be reviewed was made; and if the county designated in the writ is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county where the writ is made returnable by the amendment.

§ 2130. *Mode of service.*

A writ of certiorari must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served upon each officer or other person, to whom it is so directed, or upon the corporation,

in the same manner as a summons in an action brought in the Supreme Court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section 2071 of this act, for service, upon a like board or body, of an alternative writ or mandamus.

§ 2133. Subsequent proceedings as in an action.

After a writ of certiorari has been issued, the time to make a return thereto may be enlarged or any other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.

§ 2137. When third person may be brought in.

Upon the application of a person, specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the Supreme Court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

The writ must be issued under seal of the court, but the omission of the seal does not make the writ void and the defect may be cured by amendment. *People ex rel. H. & M. R. R. Co. v. Assessors of Herkimer*, 6 Civ. Pro. 297. This case arose under the Tax Law.

It is said in *Mott v. Com'rs*, 19 Wend. 640, that a copy of the order allowing the writ should be served with it, or there should be an indorsement that it is allowed, but that error in that respect may be amended. The proper practice and that universally adopted, is to have the writ indorsed in form given in precedent. The simple and usual custom is to have two or more writs signed by clerk and sealed, one for service, the other as a duplicate original to be retained by the attorney, although this, of course, is not necessary. It was also held, in *People v. Perry*, 16 Hun, 461, that a copy of the affidavit on which a writ is granted need not be served on respondent. In this respect, however, the usual practice is to serve a copy of the affidavit together with a copy of the order granting the writ, and the writ itself, thus giving the respondent copies of all the papers in the matter.

A motion to dismiss a writ of certiorari, being in the nature of a demurrer, may be made and granted before return has been made to the writ. *People ex rel. Miller v. Peck*, 73 App. Div. 89, 76 Supp. 328.

Where it appears, upon the face of a writ of certiorari, that it is insufficient in law, and that certiorari does not lie to review the acts complained of, the Special Term has power to quash the writ upon a motion made on the writ alone, and before a return has been made thereto. *People ex rel. Hagerty v. McClellan*, 107 App. Div. 272, 94 Supp. 1107.

A motion made under the Code of Civil Procedure, section 1348, to quash a writ of certiorari may be heard by the Appellate Division, and section 2138 does not limit the jurisdiction of that branch of the court to the hearing on the issues. *People ex rel. Joline v. Willcox*, 129 App. Div. 267, 113 Supp. 861; aff'd, 194 N. Y. 383.

Where a motion to quash a writ of certiorari is based upon the petition of the relator the question presented is as to whether its allegations are sufficient in law to authorize the issuing of the writ. *People ex rel. Brownell v. Assessors of Buffalo*, 193 N. Y. 248, rev'g 127 App. Div. 851, 948.

The objection that an amendment to a petition for certiorari was improperly allowed must be by motion to quash, and not by an averment in the return, since it presents an original question which must be heard at the Special Term. *People ex rel. Syperrek v. McAdoo*, 125 App. Div. 673, 110 Supp. 140.

The object of a petition is only to get the writ, and if it be insufficient to authorize the writ to be granted a motion should be made to dismiss it and quash the writ before making the return, and if the respondent joins issue on the writ by making return to it he waives the insufficiency of the petition. *Matter of City of New York v. Sloat*, 116 App. Div. 815, 102 Supp. 1.

A motion to quash a writ of certiorari can only be made in the district where the writ is obtainable, or in a county adjoining the district. *People v. Cooper*, 57 How. Pr. 463.

After having obtained jurisdiction of a certiorari it is discretionary for the Supreme Court to quash the writ or remand the same on cause shown, or to proceed to its disposition, and an order refusing to quash is not appealable to the Court of Appeals. *Jones v. People*, 9 Wkly. Dig. 254. Where, after return made, the court is satisfied that the writ was improvidently granted, or that justice and equity or a regard to considerations of public policy require, it will be dismissed without passing on the questions intended to be raised. *People v. Common Council*, 65 Barb. 9. If improper parties are joined or errors assigned not warranted by the record, such part of the proceedings as are illegal may be quashed or corrected, and the rest

affirmed if they are independent of each other. *People v. Supervisors*, 57 Barb. 377. A decision quashing a certiorari for errors appearing upon the face of the writ and not upon the merits cannot be reviewed by writ of error. *People v. Mayor*, 1 How. 90. Where the writ appeared to have been granted at Special Term, the contrary will not be allowed to be shown by affidavit on a motion to quash. *People v. Supervisors of Ulster*, 19 Wkly. Dig. 208. A motion made be made to supersede the writ if it was improperly issued; also if not properly directed or is otherwise bad in law, it will be superseded. *Devlin v. Platt*, 20 How. Pr. 167; *Ball v. Warren*, 16 How. Pr. 379. Or where the writ has been granted to remove or review a proceeding before it is terminated, the writ will be superseded. *People v. Peabody*, 5 Abb. 194; *Comstock v. Porter*, 5 Wend. 98. But the writ cannot be quashed till after return, but it may be then quashed where it was prematurely issued or allowed by an officer having to jurisdiction to allow it, or on the application of a party not in interest, or where improperly allowed for any reason. *People v. Peabody*, 26 Barb. 437; *Devlin v. Platt*, 20 How. Pr. 167; *Caledonian Co. v. Trustees*, 7 Wend. 665; *Colden v. Botts*, 12 Wend. 234; *People v. Stryker*, 24 Barb. 650; *People v. Supervisors*, 15 Wend. 198; *People v. Mayor*, 2 Hill, 14; *Brown v. Wesson*, 1 How. Pr. 141; *People v. Overseers*, 44 Barb. 467; *People v. Supervisors*, 57 Barb. 377; *People v. Delaney*, 49 N. Y. 655; *Starkweather v. Seeley*, 45 Barb. 165; *People v. Schell*, 5 Lans. 352. The court will quash the writ if improperly allowed, even though a hearing has been had on the merits. *People ex rel. v. Stillwell*, 19 N. Y. 531; *People ex rel. v. Mayor*, 2 Hill, 9; *People v. Com'rs*, 103 N. Y. 371. Writ will be quashed where issued to require determination of assessors after roll has left their hands. *People v. Assessors*, 40 Hun, 228. In *People v. Supervisors of Rensselaer*, 34 Hun, 266, following *People v. Supervisors of Queens*, 82 N. Y. 275, it was held where a board of supervisors had audited a claim and signed the tax-roll and then adjourned *sine die*, that the board could not be required to make return to a writ of certiorari as to their proceedings, and that the writ should be quashed, as the board had no power over the matter after the roll had been signed and warrant delivered.

The same rule was held in *People v. Common Council*, 38 Hun, 7, it being said that as the writ had gone into the hands of a mere ministerial officer, and out of the control of those officers who had any judicial control of quasi-judicial control over it, and the defect was not cured by the fact that a return was made, the remedy was by

an action for damages, and the writ must be quashed. Where a board of supervisors had issued its warrant to the collector before the issuing of the writ, *held*, that it was too late and the writ should be quashed. *People v. Supervisors*, 82 N. Y. 275. See *People v. Supervisors of Albany*, 23 Wkly. Dig. 568; *People v. Tompkins*, 40 Hun, 238. An order quashing a common-law certiorari is not appealable to the Court of Appeals. *People v. Com'rs*, 3 St. Rep. 615.

The order of the court quashing the writ of certiorari issued to review the proceedings of the State Board of Equalization is discretionary under the Code of Civil Procedure, section 2127, and is not reviewable on appeal, except where the court has refrained from exercising its discretion, and quashes the writ upon the ground of a want of power to issue it. *People ex rel. Mayor v. McCarthy*, 102 N. Y. 635.

A motion to dismiss a writ of certiorari, issued to review the action of the commissioner of public safety of a city of the second class in removing a member of the police force, on the ground that the decision was not reviewable, may be made and determined before any return is made to the writ. *People ex rel. Miller v. Peck*, 73 App. Div. 89 (90), 76 Supp. 328.

It is not the practice to quash the writ at a hearing where there is a return. Upon such hearing the court should make a final order, either annulling, confirming, or modifying the determination under review. *People ex rel. W. S. R. R. Co. v. Pitman*, 9 St. Rep. 469. The writ will not be quashed, though the application therefor failed to state that no previous application for the writ had been made. *People ex rel. Brodie v. Cox*, 14 St. Rep. 632. If a tribunal, whose decision is under review, had jurisdiction and proceeded according to law and there is competent evidence to sustain the determination, errors in the reception or rejection of evidence will be disregarded. *People ex rel. Burby v. Common Council of Auburn*, 85 Hun, 601, 67 St. Rep. 3, 33 Supp. 165. Objections not made before the board, whose decision is under review, cannot be considered upon the hearing. *People ex rel. Hecker, Jones, Jewell Milling Co. v. Barker*, 67 St. Rep. 755, 33 Supp. 1019. A motion to amend the writ by setting up additional grounds cannot be made upon the argument of the case. *People ex rel. Gould v. Barker*, 14 Misc. 586, 70 St. Rep. 626, 35 Supp. 225.

The objection that a certiorari was improperly awarded may be considered on a return and hearing on the merits. Moving for an

amended return is not a waiver of motion to quash. *People v. McDonald*, 2 Hun, 70. On certiorari in habeas corpus proceedings the objection that there was no traverse to the return cannot be taken if evidence was taken and considered without objection. *People v. Carpenter*, 46 Barb. 619. If evidence was admitted without objection its competency cannot be passed upon by certiorari. *People v. Sanders*, 3 Hun, 16. Where it appears by the return to the writ that the inferior tribunal was entirely without jurisdiction it is wholly immaterial whether the relator raised the objection below or not. *People v. Robertson*, 26 How. 90. It was said in *Com'rs v. Judges of Putnam*, 7 Wend. 264, that where the contest was solely on the merits objection could not afterward be taken that one of the judges whose decision was appealed from had previously passed on the same question.

The fact that charges against the superintendent of a cemetery are stale, and have once been considered and dismissed by a former mayor, may be considered on certiorari to review the discharge of the superintendent by a subsequent mayor. *People ex rel. Dwyer v. Hogan*, 101 App. Div. 216, 91 Supp. 715.

In the first judicial district a writ of certiorari may be granted by a justice of the Supreme Court at chambers, but it should be entered in the minutes of the clerk, though a failure to make the entry would not invalidate the writ. *People ex rel. Grout v. Stillings*, 76 App. Div. 143, 78 Supp. 942.

A writ of certiorari issued to review the rejection of a claim by a town board of auditors should be quashed if issued after the schedules of audited accounts have been delivered to the supervisor, as upon such delivery the jurisdiction of the auditors terminates. *People ex rel. v. Bd. of Auditors of Hannibal*, 65 Hun, 414, 20 Supp. 165.

Where it clearly appears upon the face of the writ that no question for review is presented, a motion to quash before the court issuing the writ is proper without making a return to the writ. *People ex rel. Hagerty v. McClellan*, 107 App. Div. 272, 94 Supp. 1107.

An amendment to a petition for writ of certiorari, allowed two years and three months after the allowance of the original writ, which does not change the averments in the original petition, but states in detail one of the particulars on which they were based, is not an amendment designed to change the cause of action, and, being made before respondent filed his return, was properly allowed. *People ex rel. Syperrek v. McAdoo*, 125 App. Div. 673, 110 Supp. 140.

In *People v. Nichols*, 58 How. Pr. 200, it was held that the rule requiring eight days' notice is binding only so far as it is consistent with the Code, and that as the Code provided that a notice for hearing a motion for judgment might be made less than eight days, the Code must control, and that an application for judgment so made was regular.

The office of the writ is to compel the body or officer whose proceedings are under review to make a return of the proceedings and a statement of other matters specified in, and required by, the writ. *Beardslee v. Dolge*, 62 St. Rep. 190. The general statutory writ brings up both record and proceedings for examination, not only as to jurisdiction and method of procedure, but also as to whether there was a violation of any rule of law, or any competent proof of all essential facts, or a preponderance of proof against the existence of any of those facts. *People ex rel. Manhattan R. Co. v. Baker*, 152 N. Y. 430.

Where an order of reference is made at a Special Term, upon the consent of the board of supervisors pending a hearing on a motion for a further return by them to a writ of certiorari to review their action on a claim presented, and such order is unauthorized, the proceedings cannot be regarded as an arbitration if the order of reference also directed a further return and provided for a review by the Supreme Court and did not affect a discontinuance of the certiorari proceedings. *People ex rel. Martin, Bing & Co. v. County of Westchester*, 53 App. Div. 339, 65 Supp. 707.

Under the Code of Civil Procedure, section 2122, providing that certiorari cannot be issued to review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed, and section 2127, directing that an application for the writ must be by the person aggrieved, certiorari cannot issue on application of a town to review proceedings of the Land Office Commissioners relating to the grant of lands under water to an adjacent upland owner; since such commissioners have no power to determine the State's title to the land under water when a claim of adverse ownership is made thereto, and hence applicant was not aggrieved by any determination of the Land Board. *People ex rel. Town of Oyster Bay v. Woodruff*, 64 App. Div. 239, 71 Supp. 1044.

Where the charter of a village provided for a suit against the village on a claim, *held*, that the determination by the board of trustees refusing to audit and allow a bill for services rendered in executing commitments of the police justice, in the manner prescribed

by the charter, was not a final determination which could be reviewed by certiorari. *People ex rel. Gorr v. Schoonover*, 43 App. Div. 539, 60 Supp. 127.

A determination of the State Commissioner of Education removing a school commissioner from office for willful disregard of duties, etc., under the authority conferred by section 338 of the Education Law, will not be reversed because the State Commissioner based his determination not only upon the evidence at the hearing but also upon records in his office, consisting of letters sent and received, even though they were not called to the attention of the person removed upon the hearing. *People ex rel. Woodward v. Draper*, 142 App. Div. 102; aff'd, 202 N. Y. 612.

In a proceeding before the Public Service Commission against the Delaware and Hudson Company as lessee of the Ticonderoga railroad, for the purpose of compelling it to reduce the fare charged on said road, the lessor is not a necessary party; although under the lease it is entitled to receive from the lessee a certain dividend upon its capital stock. *People ex rel. D. & H. Co. v. Public Service Com.*, 140 App. Div. 839.

While section 2137 of the Code of Civil Procedure permits a party interested in upholding the decision under review to be brought in as a party defendant, yet where such party has not been brought in, he has no right to appeal from the decision of a court. His interests are protected by the appeal of the other respondents; though it seems that such party could be heard upon appeal by permission of the court. *People ex rel. Burnhans v. Jones*, 110 N. Y. 511. The provisions of section 2137 are permissive, and it seems that parties must avail themselves thereof in order to be heard. *People ex rel. Francis v. Mead*, 17 St. Rep. 665, 2 Supp. 117. The party can only be brought in as a party to the writ of certiorari by the court before which the writ is brought to a hearing. It cannot be done upon appeal. When proceedings instituted under the Highway Law resulted in laying out the highway, the petitioner in such proceedings to lay out the highway is the proper party to be brought in on the review of such proceeding by certiorari. On the contrary the highway commissioners of the town are not the proper parties, though the town itself may be made a party, and such highway commissioner may be the proper officer to make application for bringing in the town. *People ex rel. D., L. & W. R. Co. v. County Court*, 92 Hun, 14.

ARTICLE VII.

RETURN TO WRIT AND PROCEEDINGS THEREON. §§ 2134, 2135, 2136.

§ 2134. *Return; when and how made*, 312.

§ 2135. *Id.; how compelled; fees for making*, 312.

§ 2136. *Id.; after term of office expired*, 312.

Subd. 1. Form and contents of return, 312.

Subd. 2. Further return, 317.

Subd. 3. Return conclusive, 319.

Subd. 4. Additional affidavits, 322.

§ 2134. Return; when and how made.

The clerk with whom a writ of certiorari is filed, and each person, upon whom a writ of certiorari is served as prescribed in section 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matter, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

§ 2135. *Id.; how compelled; fees for making.*

If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of certiorari, or by an order for a further return may be punished, as a contempt of court. But a judge or clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition ten cents for each folio of the copies of papers required to be returned.

§ 2136. *Id.; after term of office expired.*

A writ of certiorari may be issued to, and a return to a writ of certiorari may be made by, an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ, as required thereby; or to make a further return, as required by an order for that purpose.

Subd. 1. Form and Contents of Return.

A return to a writ of certiorari need not be under the seal of the court, body, or officer making it. *Scott v. Rushman*, 1 Cow. 212. The return should be made by a majority of the board to whom the writ is directed. *People v. Cholwell*, 6 Abb. 151. It should be made by the officer to whom it is addressed, even though his term of office has expired. *People v. Peabody*, 6 Abb. 228; *Harris v. Whitney*, 6 How. Pr. 175.

While the return to the writ of certiorari may be required to be made by an officer whose term has expired, yet, where such return contradicts the official return made by the board itself, it seems that the return of the board will be given the controlling weight on the grounds that the record cannot be contradicted. See full discussion on the weight to be given to contradictory returns in *People ex rel. Masterson v. Marin*, 17 App. Div. 526. While the writ may issue to an officer whose term has expired, yet, where the office is a continuing office, such as the Comptroller of the State, and the record

to be reviewed is in the possession of the successor to such office, the present incumbent of the office is the proper party, notwithstanding the transaction to be reviewed was the act of the previous incumbent. Such previous incumbent need not be made a party, section 2136, Code of Civil Procedure, notwithstanding. *In the Matter of Tiffany & Co.*, 61 St. Rep. 395, 30 Supp. 495.

It has been held that section 2134 providing when and how the return to the writ of certiorari is to be made does not require that such return shall be verified. *People ex rel. Updyke v. Gillon*, 18 Civ. Pro. 111, 9 Supp. 244.

There is no statutory provision requiring an official or board of officers to verify a return to a certiorari. Presumptively their return is an official act, and, therefore, the certificate is sufficient. *People ex rel. Jones v. Diehl et al.*, 45 App. Div. 631.

The return to a writ of certiorari may be amended as to parties as well as to allegations of the petition. *People ex rel. Benedict v. Roe*, 25 App. Div. 107, 49 Supp. 227, 83 St. Rep. 227.

Upon certiorari the court cannot regard as within the return proceedings of the board the action of which is to be reviewed, taken subsequent to the issue and service of the writ. *Matter of Weeks*, 97 App. Div. 131, 89 Supp. 826.

There is no provision of law or any practice permitting matter to be stricken from a return to certiorari (*People ex rel. Higgins v. Grant*, 58 Hun, 158, 11 Supp. 505, 19 Civ. Pro. 318, 33 St. Rep. 810); and where a return contains matter not material, it need not be sent back for correction because the court on the hearing may consider such immaterial matter as surplusage. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298; *People ex rel. v. Melville*, 7 Misc. 214, 27 Supp. 1101.

An order refusing to send back a return should be affirmed when it appears from the papers that there is no merit in the application. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298. Where the return is not apparently defective, the remedy is by action for a false return, and not by motion to correct the same. *People ex rel. v. Gilon*, 9 Supp. 243, 18 Civ. Pro. 109.

If the return contains matters inserted by way of explanation or otherwise, besides what is ordered to be returned, such matter is irrelevant and is not to be regarded, and the same is true of matters asserted merely as matters of belief or information, and not as a fact. *People v. Mayor*, 2 Hill, 9; *Leroy v. Mayor*, 20 Johns. 430; *Lawton v. Com'rs*, 2 Caines, 179; *Stone v. Mayor of New York*, 25 Wend. 157.

The court, under section 2135 of the Code of Civil Procedure, empowering it to direct a "further return" to a writ of certiorari, may order concededly irrelevant matter to be stricken out. *People ex rel. Joline v. Willcox*, 134 App. Div. 563, 119 Supp. 641; rev'd, 198 N. Y. 433.

While the court in directing a further return of a writ of certiorari may direct that certain objectionable parts of the prior return be omitted, it cannot strike out such objectionable parts without ordering a further return where the prior return is left imperfect and meaningless. *People ex rel. Utica Sunday Tribune Co. v. Williams*, 140 App. Div. 58, 124 Supp. 328; rev'd, 200 N. Y. 525.

Where a board of supervisors refuses to make a return to certiorari until the fees are paid, under section 2135, it should state the amount of the fees demanded. *People ex rel. v. Bd. of Supervisors of Fulton County*, 65 Hun, 622, 20 Supp. 280. In connection with section 2135 of the Code, section 2005 should be considered; and it has been held under this latter section that the return will not be required unless where fees are paid, where it is necessary to return copies of papers on file in the town clerk's office. *People ex rel. v. Ouderkerk*, 76 Hun, 119, 27 Supp. 821.

Section 3280 of the Code of Civil Procedure, which provides that public officers upon whom a duty is imposed by law must execute the same without fee or reward, does not apply to compel board of supervisors to make a return to the writ of certiorari without the payment of the fees provided in section 2135 of the Code. *People ex rel. Sutliff v. Supervisors*, 64 Hun, 376, 46 St. Rep. 471, 19 Supp. 773.

On certiorari to review the determination of police commissioners in dismissing an officer from the force, after a trial in which the witnesses were not sworn, the respondents may be allowed to file an amended return to show, if such were the fact, that the relator had been absent without leave for five full days before the day of trial, and so had ceased to be a member of the police force by operation of law. *People ex rel. Grogan v. York*, 51 App. Div. 502, 64 Supp. 736.

It is no excuse for failure on the part of an officer required to make a return according to the terms of the writ that the directions contained therein are not pertinent to the grievances alleged; but the return must be made as ordered, unless a modification is obtained on motion. *People ex rel. Fitzgerald v. Feitner*, 37 App. Div. 362, 56 Supp. 93.

Under Laws of 1903 (p. 435, chap. 182, § 1, subsec. 29), amending Laws of 1898 (p. 371, chap. 182, Second-Class Cities Law), providing for the designation by the common council of two daily newspapers having the largest circulation and of opposite political faith as official newspapers of the city, where a petition for a writ of certiorari to review the determination of the council in designating official papers made a positive affirmation as to the independent character of one of the papers, a return not replying thereto at all except by a general allegation on information and belief that the two papers, whose designation was under review, were the two daily newspapers published in the city which had the largest circulation, and were of opposite political faith, was insufficient. *People ex rel. Troy Press Co. v. Common Council of City of Troy*, 114 App. Div. 354, 99 Supp. 1045; modif'd 186 N. Y. 548; *People ex rel. Troy Record Co. v. Same*, 114 App. Div. 908, 99 Supp. 1048.

The return should include all information, however obtained, which was before the common council, as to the interests of the community which are to be affected by the determination, the uses the highway will serve, its location with reference to other streets and other means of communication, the necessity for the new highway, the ability of the city to pay the expense, and as to any other pertinent matters. *Matter of Delavan Avenue*, 62 App. Div. 492.

An officer to whom a writ of certiorari has been issued is only required to make return as to the matters specified in the writ. The hearing must be on the writ and return. The papers on which the writ was issued can be considered only in determining the question as to the jurisdiction of the court to issue it, and possibly as establishing as facts such matters as were embraced in the writ and omitted from the return. *People v. Dains*, 38 Hun, 43; *People v. French*, 25 Hun, 111.

The return should, in addition to the transcript of the record or proceedings, state the whole truth in respect to the other matters specified in and required by the writ, and in the absence of any motion to correct or supply its defects, under section 2135 of the Code of Civil Procedure, the presumption is conclusive that it does so. *People ex rel. Gage v. Lohnas*, 54 Hun, 608, 28 St. Rep. 248, 8 Supp. 106.

The opinion of counsel on questions submitted to them by a board of assessors in regard to such assessment should not form part of the return to the writ. *People ex rel. v. Gillon*, 56 Hun, 641, 9 Supp. 690, 942. Where a relator, holding a public office, is entitled

to be informed of the cause of his removal before being removed, a communication to him by the board removing him, calling his attention to the charges, should be added to the return by order, if the same be omitted. *People ex rel. v. Myers*, 55 Hun, 608, 8 Supp. 555.

It is a sufficient return by a Comptroller of the evidence on which he acted in canceling a tax sale, where he returned the year, volume, and page of the State report on which he relied, without setting out the same *in haec verba*. *People ex rel. v. Wemple*, 67 Hun, 495, 22 Supp. 497; rev'd on other grounds, 139 N. Y. 249. A return by commissioners appointed to determine the necessity of the highway, which omits no part of the record, and includes all the evidence on which the committee acted, and states that it reached its conclusion from the evidence and from personal inspection, is not defective. *People ex rel. v. Mellville*, 7 Misc. 214, 27 Supp. 1101. A return to certiorari signed by the chairman and clerk of the board of supervisors is good, if it was authorized by the majority of the board, although not signed by such majority. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298. A return to certiorari reviewing the decision of the examining board of plumbers in refusing an application for a license is insufficient, though setting out the questions and answers on the hearing, if it does not allege that any of the questions were incorrectly answered, or show that such answers were incorrect or defective. *People ex rel. v. Scott*, 86 Hun, 174, 33 Supp. 229.

Upon certiorari procured by a railroad company to review the determination of the Railroad Commissioners certifying in behalf of another railroad company that public convenience and necessity require the construction of a railroad, a return of the proof as to the *bona fides* of the enterprise projected and the financial ability to carry it out cannot be required. *People ex rel. N. Y., New Haven, etc., R. R. Co., v. R. R. Com'rs of N. Y.*, 76 App. Div. 302, aff'g 39 Misc. 1, 78 Supp. 750.

When a petition for a writ of certiorari states certain persons to be owners of the fee in a highway as recorded, a return denying such ownership, whether open to criticism as containing a negative pregnant or not, is sufficient on appeal. *People ex rel. Burnett v. Van Brunt*, 99 App. Div. 564, 90 Supp. 845.

The return of a Comptroller should state the facts upon which he valued the stock of a corporation at par value (*People ex rel. S. I. R. T. R. R. Co. v. Roberts*, 4 App. Div. 334, 74 St. Rep. 107, 38 Supp. 724); and where tax commissioners have rejected the sworn

statements of a corporation, their return should state the information on which they acted in doing so (*People ex rel. I. R. & G. P. Co. v. Barker*, 16 Misc. 252, 39 Supp. 88) ; and likewise the return of police commissioners should state the evidence specifically which they considered in determining the guilt of an officer whom they had discharged. *People ex rel. Simermeyer v. Roosevelt*, 2 App. Div. 498, 74 St. Rep. 430, 37 Supp. 1083. Although the return does not state that the witnesses were sworn, where it does state that the charges against the policeman were duly tried, heard, and examined in the manner required by law, and by the rules of the department, the swearing of witnesses will be presumed. *People ex rel. Killilea v. Roosevelt*, 7 App. Div. 308, 40 Supp. 117. The return of a board of assessors cannot be required to give a bill of particulars of the items composing their award of damages sustained by property owners by a change of grade under the Laws of 1872, chapter 729, nor are they required to state the method by which they have arrived at their conclusion. *People ex rel. Heiser v. Gillon*, 51 St. Rep. 825, 22 Supp. 238.

Subd. 2. Further Return.

If the relator deems the return defective, as where it fails to embody all the proceedings, he should compel a further return by a proper application to the court under section 2135. It seems that his failure so to do is strictly indicative of the substantial completeness of the return actually made. *People ex rel. Quinn v. Robb*, 31 St. Rep. 642, 9 Supp. 832.

If a return to the writ of certiorari is false in fact, the remedy is by an action for a false return, and not by motion for a further return. *People ex rel. Updyke v. Gilon*, 18 Civ. Pro. 111, 9 Supp. 244. If the writ is defective the court may direct further return, and in the absence of any motion to correct or supply defects, the presumption that the return states the whole truth in respect to the matters specified in and required by the writ is conclusive. *People ex rel. Gage v. Lohnas*, 28 St. Rep. 248, 54 Hun, 608, 8 Supp. 106. Where the writ requires a full account of the proceedings to be reviewed, the court has no authority to strike out any part of the return because it may be irrelevant. Where omissions exist in the return, the court has power to order the making of a further return. This power to order a further return existed at common law. *People ex rel. Higgins v. Grant*, 58 Hun, 160, 33 St. Rep. 810, 19 Civ. Pro. 318, 11 Supp. 505.

A further return will be directed unless the board, whose determination is under review, certifies that all its acts are contained in the return; so held on the review of determination of police commissioners removing an officer. *People ex rel. v. MacLean*, 61 Super. Ct. 458, 19 Supp. 548.

If the writ of certiorari contains irrelevant and improper statements, the court will disregard them in making its decision, but no part of such return can be stricken out. If all the information which can be furnished to the court is already returned, no further return will be ordered. *People ex rel. Lovell v. Melville*, 58 St. Rep. 557, 7 Misc. 217.

It seems that if a return to a writ is evasive or not sufficiently full, the relator should compel a further return under section 2135 of the Code; but if, instead of asking for a further return, the relator is content to stand upon the return as made, the court is bound to take the same as absolutely true. If the return is false, the relator's remedy is by action for a false return. *People ex rel. P. P. Co. v. Martin*, 142 N. Y. 235, 58 St. Rep. 763, aff'g 55 St. Rep. 442. The return is conclusive as to the facts stated, and the court cannot look beyond it to the petition for facts, unless the return admit such facts in the petition. If the return is false or evasive, the relator had his remedy under this section by compelling a further return. *People ex rel. Miller v. Wurster*, 149 N. Y. 554; *People ex rel. McMillen v. Vanderpoel*, 35 App. Div. 73.

Under the express provisions of the Code of Civil Procedure, section 2135, if a return to a writ of certiorari is defective, the court may direct a further return. *People ex rel. Parker v. Bingham*, 57 Misc. 28, 106 Supp. 1079.

The practice of appointing a referee to take proof as to an alleged conversation, and of requiring the police commissioner, after the referee has reported to the court that the alleged conversation actually took place, to make a further return consisting of a copy of the referee's opinion, is illegal and unauthorized. *People ex rel. Campbell v. Partridge*, 99 App. Div. 410, 91 Supp. 258; aff'd, 180 N. Y. 542.

Section 2136 is in accord with *People v. Fire Com'rs*, 73 N. Y. 437, holding that, if a return is insufficient, a further return may be compelled. *People v. Dains*, 38 Hun, 43. This is done by motion. This was held in *Overseers of Poor of Brooklyn v. Overseers of Southold*, 2 Cow. 575. If a corporation refuses to make return, a writ of sequestration may issue after *distringas*. *People v. City of*

Brooklyn, 5 How. Pr. 314. Upon return to a writ of certiorari, if the return is false in fact or insufficient in form, the remedy is, in the former case, by action for false return and in the latter by compelling a further or more specific return. *People v. Campbell*, 50 N. Y. Super. 82.

Upon certiorari to review the determination of the State Comptroller in refusing to readjust a transfer tax imposed upon a corporation, the Comptroller should not be compelled to return the grounds of his refusal; a provision therefor in the writ is unauthorized and will be struck out on motion. *People ex rel. N. Y. Realty Corp. v. Miller*, 92 App. Div. 116, 87 Supp. 341.

Where the person upon whom a writ of certiorari has been served has made a return of all the facts and matters required by the writ, the court has no power to require him to make a further return of other facts. *People ex rel. Meehan v. Greene*, 103 App. Div. 393, 92 Supp. 1112.

There can be only one return to a writ of certiorari, unless a second return is directed or permitted by the court because the first one was defective or insufficient in form. If the original return is false in fact, the remedy is by an action for a false return. When a writ of certiorari is issued to review the determination of a board or body composed of two or more persons, the return to the writ is to be made in the name of the board or body, and may be executed by a majority of the members thereof. A separate return made by a single member of a board should be disregarded and cannot be made the basis of action by the court. *People ex rel. Lester v. Eno*, 176 N. Y. 513, rev'g 84 App. Div. 55, 82 Supp. 520.

A statement in the return of the commissioner of buildings of a city, to a writ of certiorari to review his action in removing an inspector, that the latter was given a hearing and ample opportunity of explaining the charges against him and producing witnesses before the commissioners, must be accepted as true; if the return is insufficient in form or substance it is for the relator to take proceedings to have the same corrected or to compel a further return. *People ex rel. Alexander v. Brady*, 50 App. Div. 372, 63 Supp. 1089.

Subd. 3. Return Conclusive.

It should be noted that certiorari to review assessments under the Laws of 1880, chapter 269, differs from the common-law writ and that the return therein is not conclusive. The petition is regarded as the complaint, the return as the answer; and in deciding the issues

joined thereby the court may call witnesses to its aid, and their testimony becomes part of the proceedings upon which the determination is to be made. *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 431.

In the return to a writ of certiorari to review the dismissal of a police officer, a statement by the commissioner that a letter sent to him after the conclusion of the trial was not considered in determining the guilt of innocence of the relator is conclusive. *People ex rel. Fitzpatrick v. Greene*, 97 App. Div. 502, 90 Supp. 162.

The return to the writ of certiorari is conclusive as to the facts and cannot be contradicted. If it is defective the court may direct a further return; if it is false the relator's remedy is by action. *People ex rel. Cronk v. Weld*, 6 St. Rep. 175.

Denials and allegations of a return to a writ of certiorari must be held true, so far as they join issue with material allegations of the petition. *People ex rel. Burnett v. Van Brunt*, 99 App. Div. 564, 90 Supp. 845. The court will not review facts stated in the return where they are founded upon personal inspection and individual knowledge of the locality.

The return to the State Civil Service Commission is conclusive as to the facts, even if counsel concedes that it is inconsistent therewith, and a further return must be ordered under the Code of Civil Procedure, section 2135. *People ex rel. Melody v. Pound*, 111 App. Div. 395, 97 Supp. 700.

In reviewing a determination by writ of certiorari, the court is bound by the return, and cannot consider allegations in the petition which are denied by the return, and in support of which no evidence was offered before the official whose determination is being reviewed. *People ex rel. Hubert Apartment Assoc. v. Kelsey*, 110 App. Div. 617, 96 Supp. 745; aff'd, 184 N. Y. 573.

The return to a writ of certiorari to review an officer's audit of a claim is to be regarded as the true statement of the facts relating to the audit. Although the Comptroller acts judicially in auditing a claim, and the Supreme Court has power to review his decision upon the facts, his judgment will not be overruled unless it is clear that he has erred. *People ex rel. Lovett v. Miller*, 101 App. Div. 291, 91 Supp. 639.

The rule that the denials and allegations of a return to a writ of certiorari must be taken as true, so far as they put in issue the material allegations of the petition for the writ, *applied*. *People ex rel. Lester v. Eno*, 176 N. Y. 513, rev'g 84 App. Div. 55, 82 Supp. 520.

On application for certiorari, where there is no traverse to the return, it must be taken as true. *People ex rel. Albert v. Pool*, 77 App. Div. 148, 78 Supp. 1026.

The rule that while the statements in the return to a writ of certiorari import absolute verity, when it is silent as to material allegations of fact contained in the petition the presumption is that the officers making the return intended to admit those allegations; *applied* in a review of the action of the commissioner of water supply, etc., in the city of New York, who removed the relator from the position of financial clerk of his department. *People ex rel. McGuire v. Monroe*, 97 App. Div. 283, 89 Supp. 929.

While the statements in the return to a writ of certiorari import absolute verity, when it is silent as to material allegations of fact contained in the petition, the presumption is that the officers making the return intended to admit those allegations; but this presumption does not extend to conclusions of law, which are not admitted even if not denied. *People ex rel. Vil. of Brockport v. Sutphin*, 166 N. Y. 163, modif'g 53 App. Div. 613, 66 Supp. 49.

When the return to a writ of certiorari is silent as to material allegations of fact contained in the petition the presumption is that the officers making the return intended to admit these allegations. *People ex rel. Keim v. Desmond*, 186 N. Y. 232, rev'g 111 App. Div. 757, 97 Supp. 795.

While the Appellate Division is concluded, upon review, by statements of fact contained in the return of the respondents material to the controversy, yet as regards material facts contained in the petition and admitted by the return by the respondents being silent concerning the same or otherwise not controverting them, it is the duty of the court to consider such facts contained in the petition and accompanying papers in connection with the material facts stated in the return; and mere opinions or conclusions contained in a return do not have the effect to controvert material statements. *People ex rel. Sherwood v. Blood*, 120 App. Div. 614, 105 Supp. 20.

Although the return to a writ of certiorari is conclusive and must be accepted as true, the court is not precluded from examining a conclusion set forth in it to the effect that the relator's services were not rendered to a county and that the claim of the relator was not a legal charge against it. *People ex rel. Slossom v. Bd. of Supervisors of Westchester*, 116 App. Div. 844, 102 Supp. 402.

On certiorari to review the removal of an employee in a city department without a hearing, as provided by the Civil Service Laws,

the question must be determined entirely on the return, and the allegations in the petition cannot be considered; and if the return is insufficient the remedy of the relator is to ask the court to require a further return. *People ex rel. Storey v. Butler*, 124 App. Div. 148, 108 Supp. 848.

Subd. 4. Additional Affidavits.

It seems that additional affidavits will not be considered upon the hearing except for the purposes set forth in section 2139, that is to say, for the purpose of showing facts essential to the jurisdiction of the body or officer to make the determination to be reviewed; or that the officer whose duty to make a return has died, absconded, or removed from the State, etc. *People ex rel. Simons v. Murray*, 14 Misc. 177, 69 St. Rep. 815. See also *People ex rel. Kidd v. Com'rs of Excise*, 25 Supp. 874; *People ex rel. Sprague v. Bd. of Excise*, 91 Hun, 99; *People ex rel. McMillen v. Vanderpoel*, 35 App. Div. 73.

It seems that whatever power the court has to consider additional affidavits on the hearing of certiorari by virtue of section 2139 of the Code, yet, after argument and after several months have elapsed since the filing of the return, the court will not permit the introduction of affidavits. *People ex rel. S. C. O. Co. v. Wemple*, 61 Hun, 85, 15 Supp. 447.

The hearing to review the refusal of an excise board to grant a license must be heard upon the writ and the return; and the individual affidavits of the members of such board will not be considered except in the case of their absence, insanity, or death (*People ex rel. Sprague v. Bd. of Excise*, 91 Hun, 94, 71 St. Rep. 697, 36 Supp. 678); nor should affidavits which are merely cumulative be considered upon the hearing. *People ex rel. Shields v. Hayden*, 7 Misc. 292, 58 St. Rep. 544, 27 Supp. 893.

The court cannot consider affidavits tending to show that the return is false, nor refer it to a referee to ascertain the truth. Remedy is only by an action for a false return. *People v. Mayor of Syracuse*, 6 Hun, 652; *People v. Ryken*, 6 Hun, 625. The return to a writ of certiorari must be taken as conclusive and acted upon as true; if false in fact the remedy is by an action for a false return. *People v. Fire Com'rs*, 73 N. Y. 437.

An affidavit is inadmissible before the Appellate Division, except to establish some fact bearing upon the jurisdiction of the board. *People ex rel. Schulz v. Bd. of Con. and Appor. of Albany*, 39 App. Div. 30, 56 Supp. 334.

An affidavit of members of the committee of the board of supervisors as to what took place before the committee in regard to relator's bill may properly be made a part of the return to a writ of certiorari. *People ex rel. Caldwell v. Supervisors of Saratoga Co.*, 45 App. Div. 42, 60 Supp. 1122.

ARTICLE VIII.

HEARING AND QUESTIONS TO BE DETERMINED §§ 2138, 2139, 2140.

Subd. 1. Hearing must be on return and accompanying papers, 323.

§ 2138. *Hearing upon return, 323.*

§ 2139. *Id.; upon affidavits, 323.*

Subd. 2. Questions determined on certiorari before present Code, 326.

Subd. 3. Questions which will be determined under section 2140, 330.

§ 2140. *Questions to be determined, 330.*

Subd. 1. Hearing Must Be on Return and Accompanying Papers. §§ 2138, 2139.

§ 2138. *Hearing upon return.*

The cause must be heard at a term of the appellate division of the Supreme Court, held within the judicial department embracing the county where the writ was returnable. Either party may notice it for hearing at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

§ 2139. *Id.; upon affidavits.*

If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new certiorari; the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.

Section 2138 requires the case to be heard not only upon the return, but also upon the papers upon which the writ was granted. It is not, however, the design of this extension of the law to allow the return to be controverted or overthrown in its statement by anything contained in the papers presented for the allowance of the writ. At common law the return was conclusive as to the facts contained in it, and it seems that it was not the purpose of the Legislature by the provisions of section 2138 to interfere with the existence of the previous rule. The intention was, it seems, that, where the return itself might be silent, the affidavits or papers upon which

the writ was granted might be resorted to for the purpose of including facts not sent out in the return. *People ex rel. McCarthy v. French*, 25 Hun, 112. See this case for a discussion to the scope of section 2138 of the Code of Civil Procedure, as to what papers shall be used upon a hearing.

Affidavits upon the part of the relator not used on the application of the writ and first presented when the matter is heard thereto are no part of the return, and are not admissible in the case. *People ex rel. Sprague v. Bd. of Excise*, 91 Hun, 98. Though section 2138 of the Code of Civil Procedure provides that the hearing upon the return to certiorari "must be heard upon the writ and return, and the papers upon which the writ was granted," yet this does not mean anything more than what the General Term must have before it at the time of the hearing and upon which it must base its decision. Where the return to a writ of certiorari practically admits all the allegations of the petition, such allegations may be considered by the court. *People ex rel. White v. Clinton*, 28 App. Div. 478, 51 Supp. 115, 85 St. Rep. 115.

Section 2138 does not mean that the court is at liberty to look beyond the return and to consider the facts contained in the accompanying papers, unless the return to the writ made by the respondent should be an admission made to those facts or an equivalent to an admission. *People ex rel. Miller v. Wurster*, 149 N. Y. 554, 25 Civ. Pro. 370, rev'g 91 Hun, 234, dist'g *People ex rel. Peck v. Com'rs*, 106 N. Y. 64. Though section 2138 of the Code of Civil Procedure provides that the hearing shall be had upon the writ, the return, and the papers upon which the writ was granted, yet, where the petition for the writ contains a great mass of facts which are not pertinent to the review, it seems that all the court will consider are the facts which show that a proper case existed for issuing the writ. *People ex rel. Kidd v. Com'rs*, 25 Supp. 874.

The statute requires that the hearing upon the return to the writ of certiorari must be at a term of the Appellate Division held within the judicial department embracing the county where the writ was returnable; not so, however, as to the writ to review assessments, which should be heard at Special Term. See *People ex rel. Ulster, etc., R. R. Co. v. Smith*, 24 Hun, 66.

Section 2138 provides that, except as prescribed in the following section, which provides that the court may in its discretion allow the modification of affidavits or other written proofs, the return must be heard upon the writ and return and papers upon which the writ was

granted. See *People ex rel. Hopkins v. Com'rs of Excise*, 4 Misc. 330. Except as otherwise provided, the hearing must be upon the writ, return, and the papers upon which the writ was granted; and it seems that the papers will be presumed to contain all the proceedings, inasmuch as if the relator considers the return defective he should have compelled a further return by the proper application under section 2135 of the Code of Civil Procedure. *People ex rel. Quinn v. Robb*, 31 St. Rep. 641, 9 Supp. 832.

The practice prior to the present Code required that the hearing upon the return to certiorari should be solely upon the return (*People ex rel. Simms v. Fire Com'rs*, 73 N. Y. 437), but section 2138 of the Code requires that the hearing be had upon the writ and return, and the papers upon which the writ was granted. Under this section where the return meets all the allegations of the writ and the papers upon which it was granted, and traverses them, then the hearing must be confined to the facts stated in the return, but where the return admits the facts of the writ or the papers upon which it was granted, or is silent as to them, then such facts become important, and must be considered upon the hearing. *People ex rel. Peck v. Com'rs of Brooklyn*, 106 N. Y. 67, 8 St. Rep. 635. Where the return traverses the facts alleged in the writ and the papers upon which it was granted, the hearing will be confined to the facts stated in the return though such statements as only amount to an opinion will not be considered, and the facts and circumstances relating thereto and appearing in the writ and return and papers must then be considered and the issue decided upon them. *People ex rel. Kinsella v. Wurster*, 89 Hun, 6, 69 St. Rep. 446. At common law only the return to the writ was before the court upon review, though section 2138 of the Code of Civil Procedure has changed the former practice, and now, therefore, the writ and the papers upon which it was granted must also be looked to. It seems, however, that additional affidavits will only be considered when strictly in compliance with section 2139 of the Code of Civil Procedure. *People ex rel. Simons v. Murray*, 14 Misc. 177, 69 St. Rep. 815. The court is required to determine the case upon the petition, writ, and return. *People ex rel. Hovey v. Leavenworth*, 90 Hun, 53, 69 St. Rep. 857.

While section 2139 permits the court in its discretion to allow the introduction of affidavits, yet where several months have elapsed since the return the General Term will not permit the introduction of affidavits contradicting the statements of the return after the argument upon the hearing. In such case it seems the hearing should

be restricted to the papers specified in section 2138. *People ex rel. S. C. O. Co. v. Wemple*, 61 Hun, 85, 39 St. Rep. 738, 15 Supp. 447.

Statements of counsel on argument after the evidence has been given as to facts cannot take the place of proof, and are no part of the return, whether they are replied to or not by the opposing counsel. *Burnham v. Jones*, 49 Supp. 365, 2 Supp. 148; judgment modified, 112 N. Y. 597.

Where the relator fails to deny or traverse the sufficiency of a return to a writ of certiorari the facts alleged therein will be taken as conclusive. *People ex rel. v. Koch*, 2 St. Rep. 110; *People v. Fire Com'rs*, 73 N. Y. 439.

The return made by a town board relating to their procedure on the audit of relator's claim must be taken as a true statement of the facts, the provisions of the Code of Civil Procedure, section 2139, allowing affidavits to be read, applying to a case where the party, whose duty it is to make a return, dies, absconds, or removes from the State. *People ex rel. McMillen v. Vanderpoel*, 35 App. Div. 73, 54 Supp. 436.

Section 2139 of the Code of Civil Procedure, allowing "either party to produce affidavits or other written proofs, relating to any alleged error of fact or any other question of fact which is essential to the jurisdiction of the body or officer to make the determination to be reviewed," applies only where the court is satisfied that the facts cannot be made to appear by an order for a further return. *People ex rel. Campbell v. Partridge*, 99 App. Div. 410, 91 Supp. 258, aff'g 180 N. Y. 542.

Subd. 2. Questions Determined on Certiorari Before Present Code.

The codifiers as to section 2140 said: "The questions which the foregoing section aims to settle have been the subject of a great number of adjudications within this State, many of which are obsolete and contradictory." See 2 Abb. Dig. N. E., tit. *Certiorari*, 11-13, arts. 118-139. As late as 1866 it was forcibly said by Morgan, J.: "The decisions of the courts, in relation to the office of a common-law certiorari, are so conflicting that it is quite impossible to say that any settled rule has ever been established in this State which has not been subsequently departed from," *Baldwin v. City of Buffalo*, 35 N. Y. 380. Since then these questions have been again before the Court of Appeals in various cases, in the latest of which, *People v. Smith*, 45 N. Y. 772, decided in 1871, Grover, J., lays down the following rule: "Whatever may have been the conflicting authority

heretofore, upon the question whether, upon a common-law certiorari, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject-matter, it must not be regarded as settled in this State that it is the duty of the court, in addition thereto, to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated." 45 N. Y. 776. If so much certainty has at last been attained, it seems to be desirable to prevent the possibility of reopening the questions thus decided, and to declare definitely that the cases holding the other way are obsolete by incorporating these principles into the statute. Subdivisions 1 to 4 of the foregoing section embody them correctly, it is believed, the changes of language being such only as appear to be necessary. Subdivision 5 is not in conflict with the above ruling in 45 N. Y., but it settles a question which was not considered therein, in general accordance with the opinion of Potter, J., in *People v. Eddy*, 57 Barb. 593.

In connection with these remarks it must also be noted that subsequent to 45 N. Y. 772, the line of decisions up to 1880 ran in a different direction, and in his note to this section Mr. Bliss, in his Annotated Code, very justly remarks that the section is new, "but the commissioners considered, when prepared by them, that it made no change in the law, regarding subdivision 5 as consistent with 45 N. Y. 772, and 57 Barb. 593, which were then the latest cases, but it is hardly consistent with 69 N. Y. 408, and some other cases since published." As was remarked with reference to section 2134, as to the contents of the return, the decisions before the Code were not only in direct conflict with the rule established by this section, but are not reconcilable among themselves, as may be said of the cases in 45 N. Y. and 69 N. Y., just cited. The old rule was strongly that the question of jurisdiction only could be determined on certiorari. It would seem the courts then adopted a much more liberal view, and allowed the evidence to be looked into somewhat, and questions of law to be considered; then the pendulum swung back and only questions of law, materially affecting the rights of the litigants, could be determined. The first stage arrived at by the courts is the strict adherence to the rule that on a common-law certiorari no other questions can be reviewed than those relating to the jurisdiction below, and to the regularity of the proceedings, and this view is held in the earlier cases. *Birdsall v. Phillips*, 17 Wend. 464; *Allyn v. Com'rs*,

19 Wend. 342; *Miller v. Bush*, 21 Wend. 651; *People v. N. Y. City*, 2 Hill, 9; *People v. Judge of Columbia*, 2 Hill, 398; *Haviland v. White*, 7 How. Pr. 154. To the same effect is the rule that where the jurisdiction of an inferior court depends on extrinsic facts, the court will examine the evidence to determine the question of jurisdiction, but for no other purpose. *Held*, in *People v. Bd. of Met. Police*, 24 How. 481, and substantially in *People v. Sanders*, 3 Hun, 16, also in *People v. Overseers of Ontario*, 15 Barb. 286, that on the return to a common-law certiorari the Supreme Court will not consider the weight of evidence, but they will determine whether there was any legal evidence to support the proceedings below. But it was nevertheless held during this period that on a certiorari to review summary proceedings against a tenant holding over, the court had power to look into the evidence to see whether it authorized the findings. *Anderson v. Prindle*, 23 Wend. 616; *Niblo v. Post*, 25 Wend. 280; *Benjamin v. Benjamin*, 5 N. Y. 383; *Morehead v. Hollister*, 6 N. Y. 309; *Brick v. Binniger*, 3 Barb. 391; *People v. Rochester*, 21 Barb. 656; *Carter v. Newbold*, 7 How. 166. It was also held that the court would look only into the facts returned, on the question of jurisdiction, and could not assume there was other evidence to sustain jurisdiction. *People v. Soper*, 7 N. Y. 428. But that a common-law certiorari in a bastardy case did not bring up the evidence. *People v. Duell*, 16 How. Pr. 43.

It was subsequently held that where the decision of a public board is made final and conclusive by statute the court cannot look into the evidence to sustain it in the absence of a jurisdictional fact. *People v. Canal Bd.*, 7 Lans. 220. But see rule laid down in *People ex rel. McAleer v. French*, 119 N. Y. 507. It was also held that on a certiorari to review the decision of the Canal Commissioners only legal and constitutional questions can be considered. *People v. Carrington*, 2 Lans. 368. As to certiorari to review an assessment under the General Tax Law, it was held (*People v. Fredericks*, 48 Barb. 173) that the only questions before the court were whether the assessors had jurisdiction, and whether they had kept within it. It was also said that, on certiorari to review assessment of damages, the court could not reverse the assessment as to the amount of damages, but might as to the principle on which they were assessed. *Baldwin v. Calkins*, 10 Wend. 167. But see *Matter of Mt. Morris Square*, 2 Hill, 14. In *People v. Ferris*, 36 N. Y. 218, it was held that, on certiorari to commissioners of highways, the Supreme Court could only affirm or reverse the proceeding.

Shortly after it was said in *People v. Assessors of Brooklyn*, 39 N. Y. 81, that a common-law certiorari brought up for review all questions of jurisdiction, power, or authority in the inferior tribunal, and all questions of the regularity of the proceedings which seems to mark what appears to be the transition state of the law on this subject. And in *People v. Smith*, 45 N. Y. 772, and *People v. Eddy*, 57 Barb. 593, it was determined that, in a town-bonding case, on the return to a common-law writ of certiorari, the court was not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication to be made, and whether, in making it, any rule of law affecting the rights of the petitioner had been violated, and that the court might examine as to whether the inferior tribunal had jurisdiction. Whether the moving party had, on all the facts proved, made out a case, whether the testimony supported the matter charged, but with the qualification that where some evidence is given to support the case, however slight, if judgment be given thereon, where there is evidence upon the merits on both sides, the court will not reverse unless the case is one in which the weight of evidence is very greatly preponderating, or is so strikingly so, as to create the suspicion of injustice arising from prejudice or passion. The same rule is held in *People v. Van Alstyne*, 32 Barb. 131; *People v. Supervisors*, 57 Barb. 377. And it is held in *People v. Assessors of Albany*, 40 N. Y. 154, that a common-law certiorari, to assessors, brings up the merits as well as the questions of jurisdiction and regularity, and the same general principle is held in *People v. Bd. of Police*, 39 N. Y. 506; *People v. Com'rs*, 54 Barb. 145. It was determined in *People v. Lawrence*, 54 Barb. 589, and *People v. Tubbs*, 59 Barb. 401, that where the writ was given by statute, the authority of the court was not limited, as at common law, to questions of jurisdiction and regularity; but it might look into the merits and examine the evidence, and affirm, reverse, or quash the proceedings, as justice may require. It was in view of these decisions and to conform the practice to the rule as there settled that the codifiers prepared this section, and these cases probably best interpret its scope and meaning.

However, subsequent to the rendering of these decisions, and in matters arising before the enactment of the Code, a somewhat different rule was held. The case cited by Bliss (*People v. Bd. of Police*, 69 N. Y. 408) is, perhaps, a typical case of this class, show-

ing the backward swing of the judicial pendulum in holding that only errors of law affecting materially the rights of the parties may be corrected on common-law certiorari. The evidence may be examined to determine whether there is any competent proof to justify the adjudications made, but questions of fact on conflicting evidence, or conflicting inferences from facts or matters of judgment or discretion, cannot be reviewed. It was held in *People v. Hair*, 29 Hun, 125, that errors in the admission or rejection of evidence cannot be reviewed by certiorari.

To the same general effect is *People v. Steele*, 56 N. Y. 664, holding that it is the office of a common-law certiorari to review the determination upon the same evidence, and to examine whether the inferior tribunal has conformed in its proceedings to the express terms of the statute law, and recognized in its determination the principles of the common law; and if there were legal and sufficient evidence to authorize the finding, the decision upon the question of fact will not be disturbed. And in *People v. Police Com'rs*, 6 Hun, 229; *People v. Police Com'rs*, 52 How. Pr. 289; *People v. Weigant*, 14 Hun, 546, it is held that, on a common-law certiorari, it is the duty of the court to see whether there was any competent proof to sustain the adjudication, and whether, in making it, any rule of law has been violated, but mere matters of detail or of discretion will not be reviewed. It is also determined in *People v. Bd. of Police*, 72 N. Y. 415, that the court is not confined to the mere question of jurisdiction, but will look into the proceedings, and if the adjudication is unsupported by any evidence, will reverse it. Upon a certiorari to review proceedings in insolvency, the appellate court may determine not only the question of jurisdiction, but the regularity of the proceedings below. *People v. Sutherland*, 16 Hun, 192.

Subd. 3. Questions Which Will Be Determined Under Section 2140.

§ 2140. Questions to be determined.

The questions involving the merits to be determined by the court upon the hearing are the following only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority conferred upon the body or officer in relation to that subject-matter has been pursued in the mode required by law, in order to authorize it or him to make the determination.
3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.
4. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.
5. If there was such proof, whether there was, upon all the evidence, such a

preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence.

Since the Code of Civil Procedure, the decisions have been in accordance with the terms of this section, and in conformity with the views expressed in 45 N. Y. 772. In *People v. Fire Com'rs*, 30 Hun, 376, it was decided that, under this section, the court might, on certiorari, review the weight of evidence; and distinguished *People v. French*, 92 N. Y. 306, which held that this section only applied to cases on the hearing, and not on appeal to the Court of Appeals. The Court of Appeals held the same rule as applicable to appeals to that court in *People v. Com'rs*, 93 N. Y. 97, as follows: "Assuming the rule to be that the facts involved in the determination are satisfactorily supported by the evidence, so that the verdict of a jury finding such facts could not be set aside as against the weight of evidence, we are unable to see how it can be claimed that the decision of the commissioners was not justified."

The scope of a review upon a certiorari has been enlarged, and a judgment may be reversed if there is such a preponderance of proof against the existence of the facts found against the relator as would, had the facts been found by a jury, call for a reversal of the verdict as against the weight of evidence. *People v. Jordan*, 1 Civ. Pro. 328. The Court of Appeals held the rule as to review in that court as in previous cases cited in *People v. Fire Com'rs*, 96 N. Y. 644, citing *People v. Fire Com'rs*, 82 N. Y. 358. A conclusion of fact, if without competent proof to support it or opposed by a decided or strong preponderance of evidence, may be reviewed by the court. A decision adverse to the evidence and the conceded truth was an error subject to judicial review and correction. *People v. Zoll*, 97 N. Y. 203; *People v. Heldon*, 32 Hun, 299, holds that, on certiorari to review the decisions of referees appointed to hear an appeal from determination of highway commissioners, a presumption arises that all the preliminary requirements of the statute have been complied with, and that the only proceedings to be reviewed were those connected with the inquiry as to the fitness or unfitness of the road. In case of removal of auditor of accounts by comptroller of New York city it was held that it was not for the court to weigh the evidence so as to substitute its judgment for that of the comptroller. *People v. Grant*, Abb. Dig. 1884, p. 51, § 10. The question of extent of review of proceedings of inferior tribunals by certiorari is fully considered in *People v. McCarthy*, 102 N. Y.

630, and is held in accordance with rules laid down in the Court of Appeals under the present Code. The language of the section must, therefore, be interpreted in the light of the decisions since its enactment. Previous decisions will be found convenient for reference in all cases where no change has been made from former practice.

The question "whether in making the determination any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator" is open to review in this court (Code Civ. Pro., § 2140), and questions of like character have often been reviewed. *People ex rel. McAleer v. French*, 119 N. Y. 502; *People ex rel. Hogan v. French*, 119 N. Y. 493; *People ex rel. O'Callaghan v. French*, 123 N. Y. 636; *People ex rel. Kasschau v. Police Com'rs*, 155 N. Y. 40; *People ex rel. Shuster v. Humphrey*, 156 N. Y. 231; *People ex rel. Grogan v. York*, 166 N. Y. 582; *People ex rel. Smith v. Hoffman*, 166 N. Y. 462; *People ex rel. Clarke v. Roosevelt*, 168 N. Y. 488; *People ex rel. Shiel v. Greene*, 179 N. Y. 195 (199), rev'g 91 App. Div. 613.

One of the offices of the writ of certiorari, under section 2140 of the Code of Civil Procedure, is to inquire into the jurisdiction of the body or officer making the determination which is the subject of review. *People ex rel. Springsted v. Trustees of Cobleskill*, 49 St. Rep. 48, 20 Supp. 920; *People ex rel. Cook v. Hildreth*, 126 N. Y. 360, 37 St. Rep. 393.

Section 2140 of the Code of Civil Procedure regulates the jurisdiction of the court in respect to the questions to be reviewed; and the following section, 2141, regulating the mode in which the determination shall be declared, does not enlarge the jurisdiction prescribed by section 2140. *People ex rel. Kent v. Bd. of Fire Com'rs*, 100 N. Y. 82.

If there is evidence in the record brought to the Supreme Court by the certiorari the court must look into the facts. It is the purpose of the law to give a review in the Supreme Court by certiorari, not only upon the law but upon the evidence to the extent specified in the statute. Code Civ. Pro., § 2140. Every party who seeks such a review is entitled to the fair and judicious exercise of that jurisdiction. *People ex rel. McAleer v. French*, 119, N. Y. 507.

The statute by section 2140 of the Code of Civil Procedure has extended the operation of the writ of certiorari beyond what it has at common law. Not only may the court inquire into the jurisdiction of the body or officer making the determination which is the subject of review, and whether it has pursued the mode required by law,

but also whether any legal rules have been violated to the prejudice of the relator; and it may examine the facts so far as to ascertain whether the determination was supported by the evidence or was against the preponderating weight of evidence. *People ex rel. Cook v. Hildreth*, 126 N. Y. 364, 37 St. Rep. 393.

Where a determination reviewable on certiorari could not stand if it had been the verdict of a jury, it will be set aside as against the weight of the evidence, under the Code of Civil Procedure, section 2140, providing that on certiorari "the questions involving the merits to be determined by the court on the hearing are the following only (subd. 5); whether there was on all the evidence such a preponderance of proof against the existence of any facts necessary to be proved that the verdict of a jury affirming the existence thereof rendered in an action in the Supreme Court, triable by a jury, would be set aside by that court as against the weight of the evidence. *People ex rel. McElearney v. Monroe*, 106 App. Div. 607, 94 Supp. 366.

The question on review on certiorari is whether a verdict of a jury against the relator rendered on his trial for perjury upon the proof to sustain a charge of perjury in the proceedings would be set aside as not warranted by the evidence. *People ex rel. Madigan v. Sturgis*, 110 App. Div. 1, 96 Supp. 1046.

Under the Code the Supreme Court is at liberty to review the evidence, and to review the decision whenever it would feel justified in setting aside a verdict upon the same evidence as against the weight of evidence. *People v. Bd. of Fire Com'rs*, 30 Hun, 376.

Under the Code of Civil Procedure, section 2140, providing that a determination of the State Board of Equalization, reviewed by certiorari, may be reversed where there is such a preponderance of proof against it that a verdict of a jury affirming the existence thereof in an action in the Supreme Court would be set aside as against the weight of evidence, the preponderance should be so great that the error would clearly appear to authorize a reversal. *People ex rel. Hunt v. Priest*, 90 App. Div. 520, 85 Supp. 481.

Errors in the reception or rejection of evidence by the tribunal whose proceedings are under review should be disregarded by the court if the tribunal has jurisdiction of subject-matter of the investigation, and had conducted its proceedings in the mode required by law, in order to authorize it to make the determination, where there is sufficient competent evidence upon which the tribunal would be authorized to review the determination which it made. So held in certiorari to review the proceedings of the common council of

a city in removing the city attorney. *People ex rel. Burbey v. Common Council*, 85 Hun, 612, 67 St. Rep. 3, 33 Supp. 165. Likewise it has been held that the decision of State assessors in admitting evidence is not a violation of subdivision 3 of section 2140 of the Code of Civil Procedure, as it does not violate "any rule of law affecting the rights of the relators." It seems, however, that a refusal to receive evidence absolutely essential to the protection of either of the parties would constitute an erroneous ruling of law affecting the rights of the parties within the subdivision of this section. *People ex rel. Schabacker v. State Assessors*, 47 Hun, 452, 14 St. Rep. 309, limiting *People ex rel. Supervisors of Chenango Co. v. Bd. of State Assessors*, 22 Wkly. Dig. 453.

Where a town board refuses to audit the claim of a contractor at its full amount, but assumes conditionally to audit the claim for a less amount, a rule of law has been violated to the prejudice of the relator under subdivision 3 of section 2140, and in such case the court has power to amend and modify the determination of the town board. *People ex rel. Groton Co. v. Town Bd. of Campbell*, 92 Hun, 585. In reviewing the action of a board of taxes and assessment of the city of New York in dismissing a tax assessor and discharged soldier because of physical incapacity, it is the duty of the court to see if any rule of law affecting the rights of the relator was violated to his prejudice, and whether there was any competent proof of all the facts necessary to be proven to justify the determination. *People ex rel. Haverty v. Barker*, 1 App. Div. 533, 37 Supp. 555; aff'd, 149 N. Y. 607. See this case as to what was insufficient and inadmissible evidence to warrant dismissal under the circumstances.

The State Board of Railroad Commissioners may grant an application by a railroad company for leave to abandon one of three stations in a city of 25,000 inhabitants, notwithstanding the fact that the station has been paid for by the citizens and was conveyed to the railroad company under an agreement that in consideration thereof the railroad would cause its trains to stop at said station for passengers, and where the agreement contained nothing to indicate how long it should continue in force. It seems that the Board of Railroad Commissioners is not authorized to pass upon the force and effect of contracts made between a railroad company and third parties. *People ex rel. Loughran v. Com'rs*, 32 App. Div. 160, 52 Supp. 901; aff'd, 158 N. Y. 421.

Where a clerk in the department of buildings of the city of New

York was removed without service upon him of a notice of the cause of his proposed removal, and without a hearing being given him, as required by the Consolidation Act (L. 1882, chap. 410, § 48), such a removal is without according the relator his legal rights and he should be reinstated. *People ex rel. McCabe v. Constable*, 27 App. Div. 74. Also *held*, in this case, that upon the facts the charge upon which he was removed was frivolous and baseless. It is part of our State system to commit many governmental powers, involving judicial, executive, and ministerial functions, to a single officer or a board or commission, and if such body, in the exercise of its functions, renders its decision upon a misapprehension of the law, such error should be corrected. So *held*, in relation to the decision of the Board of Railroad Commissioners in reference to an application by a street surface railroad for permission to change its motive power. *People ex rel. Babylon R. R. Co. v. Com'rs*, 32 App. Div. 179, 52 Supp. 908; *aff'd*, 158 N. Y. 711.

The questions to be determined upon the hearing of certiorari are now specifically stated in section 2140 of the Code, which does not permit a review of matters committed by law to the judgment or discretion of a lower tribunal; and, therefore, under the Laws of 1893, chapter 481, amending the Excise Law and giving a review of the decision of the commissioners in refusing a license where such license has been "arbitrarily or unreasonably refused," the court has no power of independent inquiry and is limited solely to a review of the record presented. *People ex rel. Kidd v. Com'rs of Excise*, 25 Supp. 874. While the court upon certiorari may review the action of a board of supervisors, it will not reverse their decision for receiving incompetent evidence ordinarily, but where they fail to audit the bill properly, in neglecting to pass upon the items of the relator's claim, their determination should be set aside under subdivision 3 of section 2140, as the allowance of a gross sum instead of passing upon the items is not a proper audit. *People ex rel. Sutliff v. Supervisors*, 74 Hun, 255, 55 St. Rep. 891.

The decision of assessors upon a claim for damages sustained by reason of a change of the grade of a city street is open to review under subdivision 3, section 2140 of the Code of Civil Procedure, which provides that the court must inquire "whether in making the determination any rule of law affecting the rights of the party thereto has been violated to the prejudice of the relator," even when the facts are conceded in the return. Thus where it was conceded that damages were in fact sustained, but that the assessors arrived at their

conclusion by offsetting benefits, *held*, that a question of law was presented and the decision of the assessors thereon was open to review. *People ex rel. Brisbain v. Zoll*, 97 N. Y. 208.

The decision of the Comptroller in determining an application for the revision and readjustment of taxes stands in some respects like the verdict of the jury, and should not, under Code, section 2140, subdivision 5, be set aside, except upon reasons that would justify the court in setting aside the verdict as against evidence. *People ex rel. A. C. & D. Co. v. Wemple*, 60 Hun, 234, 38 St. Rep. 23, 14 Supp. 863.

The decision of the Comptroller in deciding whether property within his jurisdiction is taxable, which is his duty by statute, will not be set aside unless it is evident that the valuation is erroneous. *People ex rel. A. C. & D. Co. v. Wemple*, 60 Hun, 234. Before the court will reduce or modify an assessment made by the Comptroller having jurisdiction of the party and subject-matter, it must be made to appear affirmatively that the assessment is in part or in whole erroneous. *People ex rel. E. E. I. Co. v. Wemple*, 61 Hun, 65. It seems that upon certiorari to review assessments where the board of assessment is, by city charter, made exclusive judge as to whether property has been benefited by an improvement, the court will not review the determination of the board upon such a question, except for errors of law. *People ex rel. Davidson v. Gilon*, 126 N. Y. 157.

On certiorari by a prison warden to review a decision of the department of correction removing him from office, *held* that the admission of testimony concerning acts of the relator prior to those particularized in the specifications, and showing mental weakness and incapacity, did not call for setting aside the determination, though the evidence might not have been competent in a common-law court. *People ex rel. O'Shea v. Lantry*, 44 App. Div. 392, 60 Supp. 1009.

Where a petition for certiorari to review an officer's dismissal from a municipal position alleged that the determination of the deputy commissioner that relator was guilty was not his free and honest determination, but was induced by threats by the person preferring the charges; and that at the close of the hearing the commissioner examined the evidence and told the deputy and the prosecutor that the charges were frivolous and ridiculous, and that relator must not be removed; whereupon prosecutor threatened to resign unless relator was found guilty and removed, and that relator's determina-

tion of guilt was then decided on under such threat, which allegation was not denied by the return, the determination should be annulled. *People ex rel. McGuire v. Monroe*, 97 App. Div. 283, 89 Supp. 929.

The decision of the commissioner of public works of the city of New York dismissing an employee will not be reversed, if the evidence before him was sufficient to support it, although the court might have come to a different conclusion. *People ex rel. Gear v. Dalton*, 52 App. Div. 627, 65 Supp. 426.

Under the Code of Civil Procedure, section 2140, relating to review on certiorari, on the review of the decision of the mayor on charges of neglect of duty preferred against an appointive officer of the city, the question to be determined is whether there is such a preponderance of evidence against the existence of the facts found that a verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court triable by jury, should be set aside by the court as against the weight of evidence, though the relator alleges that, in the making of the decision, rules of law were violated to his prejudice. *People ex rel. Dwyer v. Hogan*, 101 App. Div. 216, 91 Supp. 715.

Upon certiorari to review the refusal of a county treasurer to grant a liquor tax certificate the court has no power to inquire into the validity of an election upon the question of local option, or to require the town clerk and election officers to make a return of their proceedings. *People ex rel. Smith v. Hamilton*, 29 Misc. 465, 61 Supp. 979.

Where the return to a writ of certiorari includes as a part thereof all of the proceedings and testimony taken before the Railroad Commissioners, the Appellate Division is not precluded from looking into the evidence by a statement of fact, but may examine the evidence and findings and if the evidence fails to support the determination may annul it. *People ex rel. N. Y. C., etc., R. R. Co. v. Public Service Com'rs*, 195 N. Y. 157; aff'd 122 App. Div. 283 106 Supp. 968.

The removal by a State Architect of a building inspector, after a fair trial on charges preferred by the chief inspector, the architect deciding that the inspector was incompetent and guilty of misconduct, cannot, under the Code of Civil Procedure, section 2140, relative to questions to be determined on certiorari, be disturbed; there having been competent proof of the facts necessary to be proved to authorize the determination, and it being impossible to

say that there was such a preponderance of proof against the existence of any of those facts that, if the determination was based on the verdict of a jury, it could be set aside as against the weight of evidence. *People ex rel. Leet v. Heins*, 127 App. Div. 930, 112 Supp. 139.

Under the Code of Civil Procedure, section 2140, providing that the questions involving the merits to be determined by the court on the hearing on return of a writ of certiorari are the following only, . . . whether in making the determination any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator, certiorari lies to review the determination of the common council of the city of Troy in designating, without compliance with the statutory provisions, official newspapers of the city. *People ex rel. Troy Press Co. v. Common Council of City of Troy*, 114 App. Div. 354, 99 Supp. 1045; modified, 186 N. Y. 548.

ARTICLE IX.

FINAL ORDER AND ITS EFFECT. §§ 2141, 2142, 2144, 2145.

§ 2141. *Final order upon the hearing*, 338.

§ 2142. *Restitution may be awarded*, 338.

§ 2144. *Entry and enrollment of final order*, 338.

§ 2145. *Effect thereof*, 338.

§ 2141. Final order upon the hearing.

The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.

§ 2142. Restitution may be awarded.

Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.

§ 2144. Entry and enrollment of final order.

The final order of the court upon the certiorari must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order, and a certified copy of each order which in any way involves the merits, or necessarily affects the final order.

See §§ 1237, 1345, and 1354.

§ 2145. Effect thereof.

The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the Court of Appeals, the proceedings below are stayed in like manner.

It was held, previous to the enactment of section 2141, that the Supreme Court could only affirm or reverse the proceedings of

court below on certiorari. *Baldwin v. Calkins*, 10 Wend. 167; *People v. City of Brooklyn*, 14 Abb. N. S. 115; *People v. Ferris*, 36 N. Y. 218. It was thought by the codifiers that this rule, in many instances, worked injustice, and the foregoing section was prepared for the purpose of extending the power of the court on certiorari, so as to correspond to the power vested in the Court of Appeals and the Supreme Court upon appeals from orders in special proceedings as well as in actions. It is further observed that the section is so drawn as to confine the power of modification to the determination appealed from and to the parties before the court. The provisions of the Code of Civil Procedure, section 2141, authorizing the court, upon a hearing on return to a writ of certiorari, to make a final order annulling or confirming, wholly or partly, or modifying the determination reviewed, does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion.

It is to be read in connection with section 2140, which defines the questions which may be determined on certiorari, and simply gives power to correct an erroneous determination instead of reversing it absolutely. Where, therefore, the General Term on certiorari modified an order, and there was no question of jurisdiction, procedure, or evidence, giving the General Term jurisdiction, *held*, error. *People v. Bd. of Fire Com'rs*, 100 N. Y. 82.

Section 2141 of the Code of Civil Procedure, though it authorizes the court upon the hearing to the writ of certiorari "to make a final order annulling or confirming wholly or partly or modifying the determination to be reviewed," does not, nevertheless, authorize the review or modification of decisions of inferior tribunals in matters in which they had discretion and which are within their jurisdiction. Thus where commissioners have discharged a fireman after a trial, their decision as to the nature and extent of the punishment within the limits of the statute is not reviewable by the court, as the same is within their discretion. *People ex rel. Burns v. Purroy*, 46 St. Rep. 910, 19 Supp. 713; *People ex rel. Kent v. Bd. of Fire Com'rs*, 100 N. Y. 84. See, also, *People ex rel. Masterson v. French*, 110 N. Y. 498.

It seems that where a school trustee in making an assessment has jurisdiction of the persons and subject-matter taxed, the fact that the tax is erroneous does not invalidate the whole assessment because such error may be corrected and modified under section 2141

of the Code of Civil Procedure. *Norris v. Jones*, 7 Misc. 202. See same case on appeal, 81 Hun, 313. An order appointing commissioners under chapter 568 of the Laws of 1890, to certify as to the necessity of ordering a highway, if properly made, cannot be reviewed upon certiorari under the Code of Civil Procedure, nor can their determination be annulled wholly or partly, or modified under section 2141, because under the statute the County Court may confirm or vacate such report of commissioners and review all the proceedings in laying out a highway, thus furnishing an adequate remedy. *People ex rel. Hanford v. Thayer*, 88 Hun, 137, 68 St. Rep. 281. Where a relator has been unlawfully discharged from a public office in anticipation of an event in which his discharge might have been lawful, the court in reinstating him will not so modify the decision of the court below as to allow him only salary to the date upon which he might have been properly discharged. He is entitled to be restored to the position. *People ex rel. Dean v. Brookfield*, 1 App. Div. 67, 37 Supp. 107.

Section 2142 is practically an amplification of the preceding section, and gives a further statement that the court upon annulling or modifying a decision may order and enforce restitution in like manner and with like effect, and subject to the same conditions, as where a judgment is reversed upon appeal. Compare sections 1292 and 1323, Code of Civil Procedure, regulating final restitution when a final judgment or order is reversed or modified upon appeal. See the case of *Haebler v. Myers*, 132 N. Y. 367, 44 St. Rep. 405, 28 Abb. N. C. 179, which discusses the nature of restitution.

These statutes as to restitution, it seems, were enacted in recognition of the right of restitution as it existed at common law, and furnished an additional means of enforcing that right. The right is not exclusive but cumulative, and the remedy is exercised by the entry of a judgment or order in the action in which the erroneous judgment or order was rendered or made. Compare also *Matter of Assignment of Wiltse & Fromer*, 5 Misc. 114. Where there has been an erroneous assessment, and such assessment had been paid, the whole determination need not be reversed but may be modified, and restitution may be ordered under section 2142, Code of Civil Procedure, to those who have so paid the assessment. *People ex rel. N. Y., O. & W. R. R. Co. v. Chapin*, 42 Hun, 241.

An evasion of an order granted on certiorari compelling a commissioner of correction of the city and county of New York to reinstate the relator to his office of warden in the prison, is a contempt,

and an order committing such commissioner for contempt is proper. In this case the relator succeeded in his application for a reinstatement, and the order on certiorari required the commissioner "to restore him to the possession of the State office or position, and the rights, powers, privileges, and emoluments thereof." The commissioner made an order stating that two wardens were necessary, and continued another appointee to serve during the day, the period during which the duties of a warden were performed, and reinstated the relator as a warden to serve only at night which merely constituted him a night watchman. It was *held* that such action by the commissioner was merely a shallow pretext for disobeying the order of the court and was punishable as a contempt. *People ex rel. Fallon v. Wright*, 22 App. Div. 165.

Under sections 2144–2145, no formal judgment seems necessary, beyond the final order; under the former practice a very elaborate judgment was entered.

If judgment is desired it may be entered in the usual form of judgment of affirmance, or dismissing writ, as the case may be.

ARTICLE X.

COSTS. §§ 2143, 3253.

§ 2143. *Costs*, 341.

§ 3253. *Additional allowance to either party in difficult cases, etc.*, 341.

§ 2143. *Costs*.

Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.

§ 3253. *Additional allowance to either party in difficult cases, etc.*

In an action brought to foreclose a mortgage upon real property, or for the partition of real property, or in a difficult and extraordinary case (where a defense has been interposed in an action), or, except in the first and second judicial districts in a special proceeding by certiorari to review an assessment, under article thirteen of the tax law, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due or claimed to be due upon the mortgage nor the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, specified in this section, where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved.

The rule governing costs in certiorari under the Code of Civil Procedure, section 2143, has no application to certiorari to review assessment under chapter 269, Laws of 1880. Under section 6 of said law costs shall not be awarded against assessors or other officers whose proceedings may be reviewed under this act, unless it shall

appear to the court that they acted with gross negligence, with bad faith, or with malice. *People ex rel. Niagara Falls Co. v. Russell*, 57 Hun, 55, 10 Supp. 392, 32 St. Rep. 21. See *People ex rel. Scrafford v. Stedman*, 57 Hun, 281, 10 Supp. 789, 32 St. Rep. 652, for costs awarded in the discretion of the court under section 2143 of the Code of Civil Procedure on certiorari directed to commissioners of highways to review an order laying out a road.

The provisions of section 2143 of the Code of Civil Procedure do not apply to certiorari to review assessment. The costs allowed on certiorari to review assessment are those allowed in an ordinary action. *People ex rel. Fairchild Co. v. Coleman*, 18 Abb. N. C. 247. See *People ex rel. Lee v. Doolittle*, 44 Hun, 295, for discretionary costs given under section 2143.

No costs were allowed on a writ of certiorari at common law. The subject is discussed and reasons given and explained. *People v. Metropolitan Police Bd.*, 39 N. Y. 506. There was much conflict over this question under the Code of Procedure, and the question seems to have been decided in favor of the allowance of costs as a special proceeding. *People v. Fuller*, 40 How. 35. The decisions under the present statutes have been under the provisions of chapter 269 of the Laws of 1880, providing for the review of assessments by certiorari, and will be more fully referred to under that head. They are *People v. Keator*, 67 How. Pr. 277; *People v. Peterson*, 16 Wkly. Dig. 70; *People v. Keator*, 36 Hun, 592; *People v. Fonda*, 22 Wkly. Dig. 477. Where the judgment of a court-martial is brought into the Supreme Court on a writ of certiorari, and there reversed, the respondent is personally liable for costs awarded by the final order and may be adjudged guilty of contempt for non-payment. See section 2007; *Matter of Leary*, 30 Hun, 394.

Costs on a writ of certiorari are granted or withheld in its discretion by the Appellate Division, upon the writ itself and not upon the original trial which is sought to be reviewed.

Although the Court of Appeals has reversed a dismissal of the writ by the Appellate Division, and also the determination of a police commissioner dismissing a police officer, "with costs to abide the event," nevertheless the Appellate Division may deny costs to the successful relator in its discretion.

Hence, in the absence of such an award of costs by the Appellate Division, the relator cannot tax costs on a judgment entered on the remittitur of the Court of Appeals. *People ex rel. Shiels v. Greene*, 114 App. Div. 168, 99 Supp. 679.

Costs may be awarded, in the discretion of the court, at the rate allowed for similar services in an action. *O'Neil v. Mansfield*, 47 Misc. 516, 95 Supp. 1009.

Subdivision 1 of section 3258 of the Code of Civil Procedure, providing that on the making of a final order in favor of the defendant in a special proceeding instituted by a State writ, the defendant, if a public officer, is entitled to recover the costs specified in section 3251 of that Code and one-half thereof in addition thereto, does not apply to a proceeding instituted by a writ of certiorari.

The costs in such a proceeding are regulated by section 2143 of the Code of Civil Procedure, authorizing the court, in its discretion, to award a sum not exceeding \$50 and disbursements. *People ex rel. Hall v. Town Auditors*, 42 App. Div. 250, 59 Supp. 10.

ARTICLE XI.

RESTRICTION ON THE RIGHT TO THE WRIT. §§ 2147, 2148.

§ 2147. *Application of this article to certain special cases*, 343.

§ 2148. *Id.*; *to civil cases only*, 343.

§ 2147. *Application of this article to certain special cases.*

Where the right to a writ of certiorari is expressly conferred, or the issuing thereof is expressly authorized, by a statute, passed before, and remaining in force after this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regulation, with respect to any of the proceedings upon the certiorari to be issued thereunder.

§ 2148. *Id.*; *to civil cases only.*

This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court.

As proceedings for criminal contempt are not provided for in the Criminal Code, it has been held that, by virtue of section 2148 of the Code of Civil Procedure, an order punishing one for criminal contempt may be reviewed by certiorari, and such has always been the practice. *People ex rel. Taylor v. Forbes*, 143 N. Y. 223, 62 St. Rep. 175, 38 N. E. Rep. 303. See, also, *People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245; *People ex rel. Choate v. Barrett*, 56 Hun, 351, 121 N. Y. 678; *People ex rel. Negus v. Dwyer*, 90 Hun, 402. (See title *Contempt*.)

Following the decision of *People ex rel. Taylor v. Forbes*, 143 N. Y. 223, 62 St. Rep. 175, 38 N. E. Rep. 303, *supra*, the General Term held that the determination of the court punishing a person for criminal contempt may be reviewed by certiorari, notwithstanding section 515 of the Code of Criminal Procedure, which provides that: "Writs of error and of certiorari in criminal actions and proceedings and special proceedings of a criminal nature . . . are

abolished, and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding or special proceedings of criminal nature is by appeal." *People ex rel. Barnes v. Court of Sessions*, 82 Hun, 258, 63 St. Rep. 821, 31 Supp. 373. See 147 N. Y. 290. Though the provisions of the Code of Civil Procedure on certiorari to review apply only to civil proceedings, yet section 2140 of the Code of Civil Procedure, which regulates the questions to be determined upon a hearing of certiorari, has been used by the court as a guide in criminal proceedings. *People ex rel. Wright v. Court of Sessions*, 45 Hun, 57, 9 St. Rep. 609.

Certiorari is a proper remedy to review a commitment for contempt. *People ex rel. Drake v. Andrews*, 134 App. Div. 32, 118 Supp. 37; s. c., 196 N. Y. 538; rev'd, 197 N. Y. 53.

(For Precedent see Art. XIII.)

ARTICLE XII.

APPEALS.

An order of the Appellate Division simply dismissing a common-law writ of certiorari without affirming the proceedings, or in any way passing upon the questions sought to be reviewed, is a discretionary order, and is not reviewable by the Court of Appeals. The discretionary character of an order dismissing such writ cannot be altered by recourse to the opinion of the court below. *People ex rel. Coler v. Lord*, 157 N. Y. 408, dismissing appeal from 29 App. Div. 455.

When the writ is quashed below, under the well-settled practice of the Court of Appeals, the appeal to that court must be dismissed. This is upon the ground that the granting or withholding of the writ is discretionary with the Supreme Court. *People v. Bd. of Police Com'rs*, 82 N. Y. 506, citing *In re Mount Morris Square*, 2 Hill, 14; *People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 N. Y. 549; *People v. Bd. of Fire Com'rs*, 77 N. Y. 605, and distinguishing *People v. Bd. of Assessors*, 39 N. Y. 81, which seems to hold a different rule; *People v. Com'rs, etc.*, 103 N. Y. 370, cases cited in points of Attorney-General; *People v. McCarthy*, 102 N. Y. 630. The court says, in *People v. Haneman*, 85 N. Y. 655, we have many times decided that an appeal to this court is not allowed from a decision of the Supreme Court quashing a writ of certiorari. If, in this case, judgment had been granted affirming the action of the commissioners of taxes an appeal would lie. There thus appears to be a distinction as to the form of the order of the General Term, and in case an appeal is desired, the order should be

one of affirmance of the action of the inferior tribunal and not quashing the writ.

It is again held in *People v. Bd. of Police Com'rs*, 86 N. Y. 639, that an order quashing a writ of certiorari is not reviewable in that court. It is held, in *People v. Fire Com'rs*, 82 N. Y. 360, that on a common-law certiorari the court will examine the record, not only for the purpose of seeing whether the subordinate tribunal kept within its jurisdiction, but also to ascertain whether there was any legal proof of facts authorizing the adjudication, and whether any rule of law affecting the relator has been violated (citing *People v. Bd. of Com'rs*, 69 N. Y. 408); and further, that if the tribunal had jurisdiction, and there was evidence legitimately tending to support its decision, and no rule of law was violated, the adjudication is final and cannot be reviewed upon certiorari, because the evidence upon which it proceeded was weak or inconclusive, or because the court issuing the writ would, if the case had originally been presented for its decision, have decided differently upon the facts. The question of what is reviewable in the Court of Appeals, on appeal from a common-law certiorari, was fully discussed in *People v. French*, 92 N. Y. 306; and it was held that the court would look into the record only for the purpose of seeing whether the subordinate tribunal has kept within its jurisdiction, based its decision upon some legal proof of the facts authorizing it, and violated no rule of law in its proceedings affecting the rights of relator. It is further held that section 2140 does not require such a review as would require the examination of evidence; that the section refers to the court hearing the proceedings on the return of the writ, and must necessarily be confined to the court in which such hearing is had. In *People v. Bd. of Police Com'rs*, 93 N. Y. 101, it is assumed that the rule is that the facts involved in the determination must be satisfactorily supported by evidence, so that the verdict of a jury finding such fact would not be set aside as against the weight of evidence, yet only error of law can be reviewed in that court, and the evidence examined to see that there is competent proof to justify the decision made. But where an order is made denying a motion to quash the writ issued in a case not reviewable by certiorari, an appeal may be taken to the Court of Appeals, distinguishing *Jones v. People*, 79 N. Y. 45, which holds that where a certiorari has been lawfully issued, it is a matter of discretion whether the Supreme Court will quash; but if unlawfully or illegally issued, the appellate court may pass upon, and might, of its own motion, quash the writ.

People v. Bd. of Com'rs, 97 N. Y. 37. In *People v. McCarthy*, 102 N. Y. 635, it is held that since section 2127 makes the allowance of the writ of certiorari discretionary with the court, an order quashing the writ is not appealable to the Court of Appeals. That if the court in making the order had refrained from exercising its discretion upon the question presented, and had quashed the writ upon the ground of a want of power to issue it, or had quashed it in a case not authorized by law, the court could properly have reviewed the questions presented by an appeal from such determination (citing 97 N. Y. 37, *supra*): "But in a case where that court has exercised its discretion with respect to the allowance or denial of the writ, and has refused to grant it on the ground that it ought not, under all the circumstances of the case, to have been issued, this court has no jurisdiction to review its determination, and so it has repeatedly held." Citing 19 N. Y. 531, 53 N. Y. 547, 85 N. Y. 655. But in a case where, although the order concluded by directing that the writ be quashed, that conclusion was preceded by an adjudication, that the proceeding brought up by the writ was valid and free from error, and the judgment quashing the writ was not rendered in the exercise of the discretion of the court, and on the grounds that the proceeding ought not to be reviewed by the writ, it presents questions of law reviewable in the Court of Appeals. *People v. Com'rs*, 103 N. Y. 370.

On a denial of an application made by relator to the Public Service Commission relator obtained a writ of certiorari, which was sustained by the Appellate Division by an order directing that the determination of the Commission be annulled and the subject-matter of the application be referred back to such Commission "for consideration and action within the limits of its authority." *Held*, not a final order and, hence, not appealable to the Court of Appeals. *People ex rel. Long Acre E. L. & P. Co. v. Public Service Commission*, 199 N. Y. 254, dismissing appeal, 137 App. Div. 810, 122 Supp. 641.

It seems that the determination upon evidence of a public improvement commission, authorized to construct curbing wherever it deems the same necessary and whenever in its judgment the public convenience requires it, that water often permeated between the layers of blue stone, causing the stones to crack when a frost occurred, to replace an existing curb of blue stone with one of granite, gives rise to no question of law reviewable by the Court of Appeals on appeal from an order confirming the proceedings of the commis-

sion on their review under a writ of certiorari. *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112.

The quashing of writs of certiorari, on the specific ground that the relator had no power or authority to obtain or prosecute them, is not exempt from review on appeal on the ground that it is an exercise of discretion. *People ex rel. Forest Commission v. Campbell*, 152 N. Y. 51, rev'g 82 Hun, 338, 614.

Where a determination of an inferior tribunal has been reversed on certiorari by the court, on the ground of being against the weight of evidence, such reversal will not be reviewed by the Court of Appeals. The court, however, goes on to say, "We do not mean to say that under no circumstances should we review such determination. In cases involving a plain violation of the well-known rule governing applications for a new trial, on the ground that the verdict is against the weight of evidence, and when it could be seen that there was an abuse of the discretion of the court and possibly in some other cases this court might review the decision of the lower court." It is further held in this case that section 2140 of the Code of Civil Procedure providing that questions involving the merits may be determined by the court upon a hearing does not apply to a hearing on appeal to the Court of Appeals and does not enlarge the jurisdiction of the appellate court. The section is confined in its operation to the tribunal issuing the writ. *People ex rel. McCabe v. Bd. of Fire Com'rs*, 106 N. Y. 261, 8 St. Rep. 698.

While the Supreme Court has power, under section 2140 of the Code of Civil Procedure, to hear evidence and set aside a verdict, yet the Court of Appeals has no such power. If there is any evidence fairly sustaining the determination, the Court of Appeals will not interfere therewith. Nevertheless, where there is no real conflict in the evidence, and there is thus a substantial failure in evidence to sustain a determination, the Court of Appeals will review the same and reverse the decision. *People ex rel. Coyle v. Martin*, 142 N. Y. 354, 59 St. Rep. 25.

Where the action of the board has been unanimously affirmed by the Appellate Division of the Supreme Court, the Court of Appeals has no jurisdiction to review the questions of fact involved. *People ex rel. Loughran v. Railroad Com'rs of N. Y.*, 158 N. Y. 421.

The general rule, that a court or board exercising judicial functions by permission of a statute has no interest in maintaining its determination and, therefore, cannot be heard on appeal therefrom, applies to the Board of Railroad Commissioners on a review, by

certiorari, of their determination that a certificate of public convenience and necessity shall issue. *People ex rel. Steward v. R. R. Com'rs*, 160 N. Y. 202, aff'g 40 App. Div. 559, 58 Supp. 94.

Under section 80 of the Highway Law, as amended by chapter 387 of the Laws of 1904, a town commissioner of highways had authority on proper application to determine that a highway was useless and should be discontinued, provided the town board made the same determination and gave written consent to the discontinuance.

As said section makes the order of such commissioner final when the proper consents and releases of damage from owners whose lands are affected have been filed, etc., the Appellate Division on certiorari to review a proceeding discontinuing a highway cannot review the determination that the highway had become useless as a question of fact. The writ brings up the record only for the purpose of enabling the court to determine whether the commissioner had authority to make the order. *People ex rel. Bushnell v. Newell*, 131 App. Div. 555, 115 Supp. 399.

ARTICLE XIII.

PRECEDENTS.

Review of Commitment for Criminal Contempt.*

Certiorari granted by Appellate Division to review order committing relator, a deputy sheriff, for contempt of court in advising and urging a witness not to produce before the grand jury certain books and papers which he was directed to produce by a subpoena duces tecum.

(*People ex rel. Drake v. Andrews*, 197 N. Y. 53.)

PETITION.

To the Supreme Court of the State of New York:

The petition of Leonard Drake respectfully shows to the Court:

That he is a citizen and resident of the city of Utica, county of Oneida and State of New York, and has been for upward of thirty years last past, and for the last five years he has been an under-sheriff of Oneida county, N. Y.

Your petitioner further alleges that at a Trial Term of the Supreme Court of the State of New York, held in and for the county of Oneida, at the courthouse in the city of Utica, on the 17th day of February, 1909, Hon. William S. Andrews, justice presiding, an order was made by said court upon affidavits of John Cox and Emerson M. Willis, verified upon that day, directing your petitioner to show cause at a Trial Term of the Supreme Court to be held at the courthouse in the city of Utica, N. Y., on the 18th day of February, 1909, at eleven o'clock in the forenoon, why he should not be punished for contempt of court. Copies of said order and of said affidavits of John Cox and Emerson M. Willis are hereto annexed and made a part of this petition. The order to show

* See "Contempt" for authorities as to what constitutes, criminal contempt.

cause is marked schedule "A," the affidavit of John Cox is marked schedule "B" and the affidavit of E. M. Willis is marked schedule "C." Attached to the last affidavit and forming a part thereof is a subpoena purporting to be issued by E. M. Willis, district attorney of Oneida county, and directed to one John Cox, of Utica, N. Y., which said subpoena is referred to in the affidavit of said Willis as being marked schedule "A."

That a copy of said affidavit and order to show cause was served upon your petitioner in the afternoon of February 17, 1909.

That on the 18th day of February, 1909, your petitioner duly appeared pursuant to said order to show cause before said Trial Term of the Supreme Court at the courthouse in Utica, N. Y., before Hon. William S. Andrews, justice presiding, in person and with William Townsend, Esq., as his counsel; that thereupon your petitioner then and there presented and filed with the court in answer to the charge of contempt claimed in said affidavits, an affidavit of your petitioner verified February 18, 1909, a copy of which is hereto annexed, marked schedule "D" and forms a part of this petition.

That said court thereupon then and there duly adourned all further proceedings in the matter until February 19, 1909, at which time your petitioner again appeared before said court with his said counsel; Hon. Emerson M. Willis, district attorney of Oneida county, N. Y., appearing for the people, when the following witnesses were sworn and examined before the court in reference to the charge made against your petitioner in said affidavits, to wit: On behalf of the people, John Cox, Mrs. Caroline Carney, James D. Carney, James M. Cox and Charles D. Berish. And there were sworn on behalf of your petitioner Leonard Drake, your petitioner, William A. Douglas and Frederick E. Swancott. That the testimony of said witnesses was duly taken before A. L. Woodward, official stenographer of said court, and a true and correct transcript thereof and of the whole thereof, as your petitioner is informed and believes, was thereafter filed in Oneida county clerk's office and a copy thereof is hereto annexed, marked schedule "E" and forms a part of this petition.

That thereafter and on or about the 13th day of March, 1909, an order was made in these proceedings, and which was entered in the Oneida county clerk's office March 13, 1909, at 11:27 A. M. on that day, and which was signed by Hon. William S. Andrews, justice of the Supreme Court, adjudging and decreeing that the acts of said Leonard Drake, your petitioner, therein referred to, constituted a criminal contempt of this court, and insolent, disorderly and contemptuous behavior on the part of an officer of the court intended directly to interrupt its proceedings and the proceedings of said grand jury, and to impair the respect due to the court's authority, and constituted a criminal contempt, a willful disobedience of a mandate of the court and resistance willfully offered thereto; and then and there ordered, adjudged and decreed that your petitioner was guilty of contempt of court, and directed that he should be imprisoned in the common jail of Oneida county for a period of thirty days and pay a fine of \$250.

That after said order had been entered in the Oneida county clerk's office, as aforesaid, a copy thereof duly certified by the clerk of said court was on the same day delivered to the sheriff of Oneida county, as your petitioner is informed and believes, and your petitioner was thereupon and under and pursuant to the provisions of said order and on the

same day, to wit, March 13, 1909, taken into custody by the sheriff of Oneida county, and ever since has been and now is confined as a prisoner within the walls of the common jail of Oneida county by virtue of said order.

That a certified copy of said order is hereto annexed, marked schedule "F," and forms part of this petition.

Your petitioner further alleges that he is advised by his said counsel and verily believes that the action of said justice and said court in issuing said warrant or order for commitment was and is illegal and void for the reason that upon the affidavits, testimony and evidence before the court upon which the court based the order herein adjudging your petitioner guilty of contempt of court and imposing imprisonment and fine thereunder, as aforesaid, your petitioner was not guilty of any or either of the acts set out in said order as constituting a criminal contempt, or of any criminal contempt, and that the court had no power to punish your petitioner as for a criminal contempt for the acts alleged in said order to have been committed by your petitioner, or for any criminal contempt. That Charles A. G. Scothorn is the clerk of Oneida county, N. Y., having the custody of the record and other papers upon which the order of contempt herein was made.

Your petitioner further alleges that at the time of the decision of the matter, the said court, through Mr. Justice Andrews, presiding, rendered an oral opinion which was then and there duly taken down by the said official stenographer and thereafter transcribed by him; and a copy of said opinion duly verified by A. L. Woodward, the stenographer, is hereto annexed, marked schedule "G," and forms a part of this petition. That, as appears from said order convicting your petitioner for contempt, as aforesaid, said oral opinion was one of the proceedings mentioned and referred to in said order and upon which the same was granted.

Your petitioner further alleges that he is aggrieved by the determination, action, decision, warrant and order sought to be reviewed hereby, and that the action of said court and said justice in the premises finally determines the right of your petitioner in these proceedings, and said determination cannot be adequately reviewed by an appeal to a court or other body or officer, and the said court or justice is not authorized by statute to rehear the matter upon your petitioner's application.

Your petitioner further alleges that no prior or other application has been made herein for the purpose of obtaining a writ of certiorari to review the proceedings of the Hon. William S. Andrews, justice of the Supreme Court, and of said court, as aforesaid, in the premises. And your petitioner is advised by his said counsel that the only manner of obtaining a review of the proceedings which resulted in his punishment for contempt is by writ of certiorari directed to Hon. William S. Andrews, justice of the Supreme Court, Fifth Judicial District of the State of New York, and the Trial Term of the Supreme Court of the county of Oneida, and the clerk of said court.

That this application is made within four calendar months after the determination of said court and said justice became final and binding upon your petitioner.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued and allowed by this honorable court directed to said Hon. William S. Andrews, justice of the Supreme Court of the Fifth Judicial District of the State of New York, and to the Trial Term of the Supreme Court

of the State of New York in and for the county of Oneida, N. Y., and to Charles A. G. Scothorn, county clerk of Oneida county, N. Y., directing that there may be made, certified and returned to this court all and singular the proceedings had before said court and said justice herein, and all orders, papers, proofs, testimony and affidavits had and used before said court and justice concerning the commitment of your petitioner, Leonard Drake, for contempt of court, including all of the evidence given upon the hearing before said justice and the rulings and decision of said court, to the end that the decision committing your petitioner for contempt of court may be reviewed and corrected on the merits by this honorable court, and that your petitioner be granted and awarded such relief as to the court may seem just and proper; and that the order committing your petitioner to the jail be canceled, annulled and set aside and your petitioner ordered discharged.

Dated, *March 15, 1909.*
(Verification.)

LEONARD DRAKE,
Petitioner.

Order for Writ.

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, held at the City of Rochester, N. Y., commencing on the 2d day of March, 1909.

IN THE MATTER OF THE APPLICATION OF
LEONARD DRAKE FOR A WRIT OF CER-
TIORARI *vs.* WILLIAM S. ANDREWS,
JUSTICE OF THE SUPREME COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE
OF NEW YORK, AND OF THE TRIAL
TERM OF THE SUPREME COURT, ONEIDA
COUNTY, N. Y., THE SUPREME COURT,
ONEIDA COUNTY, N. Y., AND CHARLES A.
G. SCOTHON, COUNTY CLERK OF ONEIDA
COUNTY, N. Y.

On reading and filing the petition of Leonard Drake, verified on the 15th day of March, 1909, and it appearing therefrom that there are proper grounds for the granting of a writ of certiorari, as therein prayed for, addressed to Hon. William S. Andrews, a justice of the Supreme Court of the State of New York and of the Trial Term of the Supreme Court in and for Oneida county, N. Y., and to said Supreme Court and to Charles A. G. Scothorn, county clerk of Oneida county, N. Y., to review the proceedings, decision and action of the said court and said justice in the matter of the commitment of said Leonard Drake for criminal contempt, as alleged in said petition.

On motion of Jones, Townsend & Rudd, attorneys for the petitioner and relator,

It is hereby ordered, that a writ of certiorari, as prayed for in the said petition, issue out of and under the seal of this court directed to Hon. William S. Andrews, justice of the Supreme Court and of the said Trial Term of the Supreme Court in and for Oneida county, N. Y., and to said Supreme Court, and to Charles A. G. Scothorn, Oneida county clerk, commanding them and each of them to certify and return to this court all and singular the proceedings in said petition referred to had before said justice and said court relative to the commitment of said Leonard Drake, together with all the records and papers relating thereto on file in Oneida county clerk's office, and a statement of any other

matters material to the determination of the application herein, together with this writ of certiorari.

That said writ be returnable within twenty days after service thereof at the office of the clerk of Oneida county, N. Y., and that said writ be allowed, signed and sealed by the clerk of this court.

The court hereby in its discretion dispenses with the notice of the application for the writ in this matter.

Dated *March 19, 1909.*

Enter in Oneida county.

ALFRED SPRING,
Associate Justice, Appellate Div., 4th Dept.

(Same title.)

Writ.

The People of the State of New York to William S. Andrews, justice of the Supreme Court of the Fifth Judicial District of the State of New York, and of the Trial Term of the Supreme Court, Oneida county, N. Y., the Supreme Court, Oneida county, N. Y., and Charles A. G. Scothorn, county clerk of Oneida county, N. Y.

Whereas, we have been informed by the verified petition of Leonard Drake, sworn to the 15th day of March, 1909, that certain proceedings were had before you holding a Trial Term of the Supreme Court in and for Oneida county, at Utica, N. Y., and before said court, which resulted in the commitment for contempt of Leonard Drake, and he being willing for certain reasons to be certified of all your proceedings as a justice of the Supreme Court holding a Trial Term of said court in and for the county of Oneida, N. Y., and of all the proceedings of the said court in making said order or commitment for contempt, and all things appertaining thereto, and return these proceedings and all orders, papers, proofs, testimony and proceedings of every nature concerning the commitment of said Leonard Drake for contempt of court within twenty days after the service upon you of this writ to the clerk of the county of Oneida under your hand as fully and amply as the same may remain before you so that our Supreme Court may further cause to be taken thereupon what of right and according to law ought to be taken, and have you then and there this writ.

Witness, Honorable Alfred Spring, Associate Justice of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, held at the courthouse in the city of Rochester, on the 19th day of March, 1909.

CHAS. A. G. SCOTHORN,

(Seal)

County Clerk of Oneida County.

JONES, TOWNSEND & RUDD,

Attorneys for Petitioner,

Utica, N. Y.

The above writ is allowed this 19th day of March, 1909, at a Term of the Appellate Division of the Supreme Court for the Fourth Department, held at the courthouse in the city of Rochester, N. Y.

(Seal)

ALFRED SPRING,

Associate Justice, Appellate Div., 4th Dept.

Order to Show Cause why Relator Should not be Punished.

(Same title.)

(Caption.)

On reading and filing the annexed affidavits of John Cox and E. M. Willis, verified February 17, 1909, it is hereby

Ordered, that said Leonard Drake show cause at a trial term of the Supreme Court to be held at the courthouse in the city of Utica, N. Y.,

on the 18th day of February, 1909, at eleven o'clock in the forenoon, why he should not be punished for contempt of court.

Service of a copy of this order and the annexed affidavit not later than seven o'clock in the afternoon of February 17, 1909, shall be sufficient notice.

Enter,

W. S. ANDREWS,
J. S. C.

Order Committing Relator for Contempt.

At a Trial Term of the Supreme Court of the State of New York, held in and for the county of Oneida, at the courthouse, in the city of Utica, commencing on the 4th day of January, 1909.

Present, WILLIAM S. ANDREWS, *Justice, Presiding.*

IN THE MATTER OF THE ALLEGED CONTEMPT
OF COURT OF LEONARD DRAKE.

Whereas an order was granted by the above court on the 17th day of February, 1909, requiring the above-named Leonard Drake to show cause, at a term of said court on the 18th day of February, why he should not be punished for contempt of court on the affidavits of John Cox and of E. M. Willis, verified said February 17th, and on the subpoena referred to in said affidavits and filed therewith, from which it appears that said Leonard Drake was on that date and during the several years previous had been under-sheriff of Oneida county, and an officer of this court, and that a regular Trial Term of the above court convened at the city of Utica, in said county, January 4, 1909, and that with said court a grand jury was duly convened and was in session on February 16th and 17th; and that on February 10, 1909, said Willis, as district attorney of said county, issued the subpoena referred to in, and annexed to, said affidavits, which said subpoena was directed to John Cox, returnable February 16, 1909, at ten o'clock A. M., and required said Cox at that time to produce before said grand jury as evidence, books, papers and writings referred to in said subpoena, and that said subpoena was duly delivered to the sheriff's office of said county for service on said Cox, and at the time of such delivery there was pending in said county to be taken up and investigated before said grand jury on said February 16th a proceeding for felony, in which John Doe, whose real name was unknown, was named as defendant, and from which said affidavits and subpoena it further appears that said subpoena in due course was given to said Leonard Drake as under-sheriff of said county for service on said Cox and that on said February 12th said Drake served on said Cox the said subpoena, and at the time of such service and at various times thereafter before said 16th day of February, said Drake told said Cox that he must not produce the books called for in said subpoena, but that he must destroy the books or hide them; and

Whereas, on the said 18th day of February, at said term of court, said Drake appeared personally and by his counsel, Hon. William Townsend, who read in opposition to the motion made upon the return of said order to show cause, the affidavit of said Drake, verified on the 18th day of February, 1909; and

Whereas, the court after reading the affidavits for and against said motion and hearing argument of counsel, adjourned the proceeding until February 19, 1909, in said term of court, at which time the oral testimony was taken of John Cox, Caroline Carney, James D. Carney, James

M. Cox and Charles D. Breish, in support of said motion, and of Leonard Drake, William A. Douglas and Frederick E. Swancott in opposition, which said testimony is filed with the said affidavits and order to show cause herein, from all of which and from a certain indictment charging Frederick E. Swancott, Samuel H. Jones et al., with grand larceny in the first degree, presented to this court, bearing name of John Cox as a witness, of which this court takes judicial notice, it appears that the said Leonard Drake did at the time of serving said subpoena, and at subsequent times before the return date thereof, solicit, request, and advise said John Cox not to produce before the grand jury the books called for by said subpoena, but to destroy or hide the same, in the following language: "Now, you musn't have any of the old books of Cox & Collins. Tell them that at the dissolution of the firm the old books were destroyed. You musn't show those books in court. You must get rid of them. Drop them behind the safe or put them in the cellar. I will steal them for you," and

Whereas, said action of the said Drake was a criminal contempt and also was disorderly, contemptuous and insolent behavior, intended directly to interfere with the proceedings of the court and grand jury and to impair the respect due to the court's authority and constituted willful disobedience of the lawful mandate of the court, and resistance willfully offered thereto,

Now, on motion of E. M. Willis, district attorney of Oneida county, in support of said proceedings, and after hearing Hon. William Townsend, counsel for said Drake, in opposition thereto, and after due deliberation and consideration having been had, and on reading and filing said affidavits above referred to, and the evidence taken on said hearing and the oral opinion of the court thereon,

It is hereby ordered, adjudged and decreed, that the acts of the said Leonard Drake, herein referred to, constitute a criminal contempt of this court, and insolent, disorderly and contemptuous behavior on the part of an officer of the court, intended directly to interrupt its proceedings and the proceedings of said grand jury, and to impair the respect due to the court's authority and constitutes a criminal contempt, and wilful disobedience of the lawful mandate of the court and resistance willfully offered thereto.

It is further ordered, adjudged and decreed, that the said Leonard Drake was and is guilty of a criminal contempt of court in and for the contemptuous behavior committed by him as aforesaid while being and acting as an officer of the court, on the 12th day of February, 1909, and at subsequent times before February 16th, which contempt tended directly to interrupt the proceedings of the court and to impair the respect due to its authority.

It is further ordered, adjudged and decreed, that for the said criminal contempt of court, the said Leonard Drake be imprisoned in the county jail of Oneida county for a period of thirty days and that he pay a fine of two hundred and fifty dollars (\$250).

Enter,

W. S. ANDREWS,
J. S. C.

Return of William S. Andrews,

(Same title.)

Justice of the Supreme Court.

To the County Clerk of Oneida County:

The return of William S. Andrews, justice of the Supreme Court of the State of New York and of the Trial Term of the Supreme Court,

Oneida county, N. Y., and the Supreme Court, Oneida county, N. Y., in obedience to the writ of certiorari hereto annexed.

I hereby certify and return that on or about February 17, 1909, upon the affidavits of John Cox and E. M. Willis, verified on said date and upon a certain subpoena thereto annexed, an order was issued by me out of said court requiring said Leonard Drake, the under-sheriff of Oneida county, to show cause before said court on the 18th day of February, why he should not be punished for contempt of court for his conduct and acts set forth in said affidavits. On the return of said show cause order said Drake appeared in person and by his counsel, Hon. William Townsend, and read and filed his affidavit denying the acts and language charged against him in the affidavits upon which said order was issued. After reading the affidavits for and against said motion and hearing argument of counsel, your relator adjourned the proceeding until February 19th, in said term of court, at which time the oral testimony was taken of various witnesses in support of and in opposition to the motion to punish said Drake for contempt of court, from all of which and from a certain indictment bearing the name of John Cox as a witness, charging Frederick E. Swancott, Samuel H. Jones et al., with grand larceny in the first degree, of which the court took judicial notice and as well considered the appearance and manner of the various witnesses in giving their said testimony, and after due deliberation I did find that on or about the 12th day of February, 1909, the said Leonard Drake, who then was and for several years had been under-sheriff of Oneida county, was given a subpoena duly issued by the district attorney of said county under and by virtue of the statute in such case made and provided, for service on one John Cox which said subpoena, among other things, required and directed said Cox on the return of said subpoena to have and produce before the grand jury then and there in session, all books, papers, records and writings of the late firm of Cox & Collins and of John Cox, showing any and all sales of property of every name and kind by said firm and by said John Cox to the county of Oneida, and all payments for said property by said county for the years 1904, 1905 and 1906, then in the custody and under the control of said Cox, as more fully appears by said subpoena. That said Leonard Drake on or about said 12th day of February duly served said subpoena on said John Cox, and at the time of such service, and at various times thereafter before the return day of said subpoena said Drake told said Cox he must not produce the books called for in said subpoena, but that he must destroy the books and hide them, and did solicit, request and advise said John Cox not to produce before the grand jury the books called for by said subpoena, but to destroy or hide the same, in language as follows: "Now you musn't have any of the old books of Cox & Collins. Tell them that at the dissolution of the firm the old books were destroyed. You musn't show these books in court—you must get rid of them—drop them behind the safe or put them in the cellar—I will steal them for you." That the grand jury before whom said Cox was subpoenaed to produce such books was sitting in connection with the Trial Term of the Supreme Court, then and there being held, at which I was the presiding justice, and that said books were proper and necessary evidence before said grand jury.

After such findings and under and by virtue of the provisions of section 8 of the Code of Civil Procedure, and under them, by virtue of the power inherent and otherwise vested in the court, I did adjudge

and declare the said Leonard Drake to be guilty of a criminal contempt of court for the contemptuous behavior found to have been committed by him while being and acting as an officer of the court, in advising, requesting and soliciting said John Cox not to produce before said grand jury the books called for by said subpoena, but to destroy or hide the same, and I did order, adjudge and decree that for the said criminal contempt of court the said Leonard Drake be imprisoned in the county jail of Oneida county for a period of thirty days and that he pay a fine of two hundred and fifty dollars (\$250), whereupon a mandate or order was duly entered and filed in said court so committing the said Leonard Drake, as aforesaid. In connection with said finding and said order and judgment, the court made remarks hereto annexed.

And I do further certify that I have caused to be annexed hereto a transcript of all orders, proofs, testimony, records and proceedings of every name and nature concerning the commitment and sentence of said Leonard Drake for contempt of court of which I have any knowledge or notice, and which said orders, proofs, testimony, records and proceedings are made a part of this return.

All of which I hereby certify and return as commanded by said writ and directed by statute.

In witness whereof, the undersigned has hereunto set his hand this 12th day of April, 1909.

W. S. ANDREWS,

Justice of the Supreme Court of the State of New York of the Fifth Judicial District and of the Supreme Court for the County of Oneida, N. Y.

(Same title.)

Return of County Clerk.

To the County Clerk of Oneida County:

The return of Charles A. G. Scothorn, county clerk of Oneida county, and of the Supreme Court of said county, in obedience to the writ of certiorari hereto annexed:

I hereby certify and return that I have caused to be annexed hereto a transcript of all orders, proofs, testimony, records and proceedings of every name and nature concerning the commitment and sentence of said Leonard Drake for contempt of court of which I have any knowledge or notice, and which said orders, proofs, testimony, records and proceedings are made a part of this return.

All of which I hereby certify and return as commanded by said writ and directed by statute.

In witness whereof, the undersigned has hereunto set his hand this 12th day of April 1909.

CHAS. A. G. SCOTHORN,

County Clerk of Oneida County and Clerk of the Supreme Court of Said County.

Attached to and forming part of the foregoing returns are the papers referred to in the foregoing petition, affidavit and orders, which are embraced in the printed record herein, and the originals of which are on file in Oneida county clerk's office.

Petition by Patrolman Dismissed from Police Force.

(People ex rel. Eggers v. Bingham, 190 N. Y. 566.)

To the Supreme Court of the State of New York:

The petition of William J. Eggers respectfully shows:

1. That your petitioner is a citizen of the United States and a resident of the borough of Manhattan, city and State of New York, and

was such at the time of his trial before the police commissioner hereinafter mentioned.

2. That your petitioner was duly appointed a patrolman on the police force of the city of New York on or about the 30th day of December, 1893, and continued in performance of his duty as such up to about the 26th day of December, 1902, when he was promoted to the rank or grade of detective sergeant by Hon. John N. Partridge, who was then commissioner of police, because of the conscientious, honest and meritorious manner in which he performed his duties as police officer.

That on or about the 1st day of January, 1904, William McAdoo, Esq., was appointed the police commissioner of the police department of the city of New York and thereafter and on or about the 25th day of January, 1905, he directed your petitioner to take command of a squad which he formed and which was known as the "Vice Squad" in said Police Department. Your petitioner was also directed by said police commissioner to make his reports and receive his orders in connection with his duties as commander of said "Vice Squad" from William Howell, secretary to said police commissioner. That your petitioner continued in command of said squad under the orders of said William Howell up to the 15th day of October, 1905, when he was transferred to the detective bureau of Brooklyn, where your petitioner continued in the performance of his duty as a detective sergeant up to about the 15th day of December, 1905. Immediately thereafter your petitioner was suspended from duty without pay and certain charges alleged to have been made by Moses W. Cortwright, chief inspector, was served upon him. That no preliminary examination or hearing before the said charges were served upon your petitioner was accorded him and as your petitioner is informed and believes the said charges were preferred by said chief inspector under direct orders from said police commissioner, after the said commissioner had, in the absence and without the knowledge of your petitioner, conducted a secret investigation and had come to the conclusion that your petitioner was guilty.

That under said charges your petitioner was accused of being guilty of conduct unbecoming an officer and neglect of duty. The specifications covered several typewritten pages, but consisted briefly of your petitioner having in his possession, custody and control sufficient evidence that a crime had been committed, but, notwithstanding, willfully and knowingly failed to make proper use of said evidence; and also with failing and willfully omitting and neglecting to produce such evidence before any proper person as required by law, and thereby your petitioner "did willfully neglect his duties in the premises and conduct himself in a manner unbecoming an officer."

That your petitioner appeared before First Deputy Police Commissioner Thomas F. McAvoy for trial and through his counsel pleaded not guilty to said charges. That although he applied through his counsel for a short delay in order to enable him to compel the attendance of a witness whose testimony was most material and important and who had been duly subpoenaed and who refused to appear in obedience to said subpoena, as appears from the affidavit of Jacob Rouss, Esq., one of your petitioner's attorneys, and which was received and marked exhibit "A," yet the application was denied and the case was abruptly closed without affording him an opportunity of compelling the attendance of said witness.

3. Your petitioner further alleges that there was no legal, competent, proper or sufficient evidence adduced at his said trial to prove him guilty of said charges, but nevertheless your petitioner was found guilty and as a punishment therefor dismissed him from the police force by the police commissioner of the city of New York. That, as your petitioner is informed by Messrs. Grant and Rouss, his attorneys, and verily believes, such judgment of conviction was wholly unwarranted, unjust, unfair, and was the result of prejudice, partiality and biased and not because of any sufficient, legal, proper or competent evidence which was adduced at your petitioner's said trial and that the said sentence of dismissal was also illegal, irregular and wholly against the weight of evidence.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this court, directed to Theodore A. Bingham, as police commissioner of the city of New York, commanding him to certify and return to the clerk of this court all proceedings had and remaining before him in any wise relating to the said trial, conviction and dismissal of your petitioner as aforesaid.

And your petitioner will ever pray, etc.
That no previous application for this writ has been made to any court or judge.

(Add verification)
Petitioner.

Petition to Review Action of Town Auditors.
(People ex rel. Sherwood v. Blood, 120 App. Div. 614.)

To the Supreme Court of the State of New York:

The petition of Frank G. Sherwood respectfully shows:
First: That he is, and was at all the times hereinafter mentioned, over the age of twenty-one years, a citizen of the State of New York, residing in the town and village of Albion, in the county of Orleans, N. Y. That he is, and was at all times hereinafter mentioned, a regular, licensed and practicing physician and surgeon, duly licensed to practice as such in the town of Albion and county of Orleans, N. Y.
Second: That the board of town auditors of the said town of Albion is composed of Hervey Blood, J. Frank Kirby and Seymour Almstead, and that they and no others now do, and have since the 1st day of January, 1904, constituted the board of town auditors of the said town of Albion.
Third: That on or about the 16th day of June, 1904, your petitioner was duly appointed, pursuant to the provisions of section 20 of the Public Health Law of the State of New York, as amended, to the office of health officer of the town of Albion, Orleans county, N. Y., a certificate of which appointment is hereto annexed and marked exhibit "A" and forms a part of this petition; and that on or about the 18th day of June, 1904, your petitioner's said appointment as said health officer was duly accepted by the State Civil Service Commission, and that your petitioner was on or about the said last date notified of such acceptance by such commission by the letter and certificate hereto annexed and marked exhibit "B" which he received from the secretary of said commission, and which said "B" forms a part of this petition. That immediately upon his being so appointed and after having received the said notification, your petitioner duly qualified and entered upon his duties of the office of said health officer.

Fourth: That pursuant to section 21 of the Public Health Law of

the State of New York, as amended, the board of health of the said town of Albion did, on or about the 6th day of October, 1904, in the said town, meet and convene for the purpose of fixing the salary of your petitioner as said health officer in accordance with the appointment and acceptance and statutes aforesaid, and did then and there duly fix the salary of your petitioner as such officer at the sum of two hundred and fifty dollars (\$250) per year for the term of office for which he was appointed as aforesaid and in accordance with the provisions of exhibits "A" and "B." That a copy and transcript of the minutes of said meeting, duly certified by the clerk thereof and of said board of health, is hereunto annexed and marked exhibit "C" and forms a part of this petition. That all of the members of said board of health were present at said meeting as stated in said minutes.

Fifth: That your petitioner now is, and ever since his appointment as such as aforesaid on the 16th day of June, 1904, has been acting in the capacity of said health officer of the town of Albion, N. Y., and ever since said date and up to the present time has regularly performed the duties of that office.

Sixth, That ever since the 24th day of May, 1903, your petitioner has acted in the capacity of health officer of the said town of Albion, having been appointed to that position by the board of health of the said town shortly before said date; that in each and every year he was up to the 16th day of June, 1904, paid his fees by the said town for such services as he performed as such officer; that at the regular annual meeting of the said board of town auditors of said town of Albion for auditing accounts against said town, held in the month of November, 1904, your petitioner presented to said board an itemized account or bill duly verified by him showing services performed by him as such health officer between November 23, 1903, and the 16th day of June, 1904, and for the fees therefor, which said account or bill amounted to the sum of nineteen dollars (\$19); and attached thereto your petitioner also presented to said board at said time a bill or account for his salary as health officer under the appointment above referred to and included in exhibits "A" and "B" for 148 days salary at the rate of two hundred and fifty dollars (\$250) per year, to wit, from the 16th day of June, 1904, to the 12th day of November, 1904, which bill amounted to one hundred and one dollars and thirty-eight cents (\$101.38); that a copy of said bills is hereto annexed and marked exhibit "D," and made a part of this petition. That both of said bills or accounts were, as your petitioner is informed and believes, examined, passed upon, audited and allowed by said board at the sum of nineteen dollars (\$19) and one hundred and one dollars and thirty-eight cents (\$101.38), respectively, and as so audited and allowed were certified by said board of town auditors to the town clerk of the town of Albion, N. Y., and to the clerk of the board of supervisors of the county of Orleans; that said accounts were marked by said auditors, "No. 87;" and that thereafter an order was duly drawn upon the county treasurer of Orleans county for the amounts aforesaid in favor of your petitioner, and that your petitioner has received his money on said order from the town of Albion for the amount of said accounts or bills.

Seventh: That at the regular meeting of the said board of town auditors of said town of Albion for auditing accounts against said town, held in the month of November, 1905, and after the 12th day of November, 1905, your petitioner presented to said board an account or bill duly

verified by him for his salary and services as said health officer from the 12th day of November, 1904, to the 12th day of November, 1905. That said account or bill amounted to the sum of two hundred and fifty dollars (\$250) and that it was for his salary for one year as said health officer and that a copy thereof is hereto annexed and marked exhibit "E," which forms a part of this petition; that as your petitioner is informed and believes, said claim of two hundred and fifty dollars (\$250) was audited by said board of two auditors, and was by said board rejected and disallowed, and as so audited, rejected and disallowed was certified by said board of auditors to the town clerk of the said town of Albion, and to the clerk of the board of supervisors of the county of Orleans, N. Y., a certificate of which rejection is entered upon said bill as appears in exhibit "E" and that a copy of a certificate of rejection signed by the members of said board of town auditors is attached to said exhibit "E."

Eighth: Your petitioner further shows that in accordance with and pursuant to section 21 of the Public Health Law of the State of New York, the said board of health of the town of Albion, N. Y., did, as he verily believes, duly meet in the said town of Albion, N. Y., on or about the 10th day of December, 1904, and did then and there, in addition to the salary already fixed by them, as alleged in paragraph "Fourth" herein, allow the reasonable expenses of your petitioner in going to, attending and returning from, the annual sanitary conference of health officers held within the State, to wit, Albany, N. Y., on December 15 and 16, 1904; that a certified copy of the minutes of said meeting of said board of health is hereto annexed and marked exhibit "F," and forms a part of this petition.

Ninth: That pursuant to the allowance of his expenses as aforesaid, your petitioner did attend the annual sanitary conference of health officers at Albany, N. Y., on December 15 and 16, 1904, and did then and there incur the expenses set forth in exhibit "G," hereto annexed and forming a part of this petition, to wit, the sum of twenty dollars and forty cents (\$20.40); and that said expenses were reasonable.

Tenth: That at the meeting of the board of town auditors of the said town of Albion, held at the time and as alleged in the paragraph numbered "Seventh" above, your petitioner presented to said board an account or bill duly verified by him for his expenses in going to, attending and returning from the sanitary conference, that said bill or account was for the sum of twenty dollars and forty cents (\$20.40), and that a copy thereof is hereto annexed, marked exhibit "G," and forms a part of this petition; that attached to said bill or account were a certificate signed by the chief clerk of the State Department of Health to the effect that your petitioner was present at said sanitary conference on December 15 and 16, 1904, and a letter from the State Commissioner of Health, written to Porter C. Bliss, supervisor of the said town of Albion, that was received by said Bliss before the 10th day of December, 1904, and which is referred to in exhibit "G;," that copies of said certificate of said chief clerk and said letter from said State commissioner are hereto annexed and marked respectively exhibit "H" and "I," which form a part of this petition. Petitioner further says that he is informed and verily believes that the said bill or account for twenty dollars and forty cents (\$20.40), was audited

by said board of town auditors at their said meeting, and was by said board of town auditors rejected and disallowed, and as so audited, rejected and disallowed, was certified by said board of auditors to the town clerk of the town of Albion, N. Y., and to the clerk of the board of supervisors of the county of Orleans, N. Y. That said account was marked by said board of auditors "No. 123," that a copy of a certificate of rejection, attached to said bill or account, and signed by the members of said board of auditors is attached to exhibit "G," and forms a part of this petition.

Eleventh: That as your petitioner is informed and verily believes, his said bills or accounts for two hundred and fifty dollars (\$250), and for twenty dollars and forty cents (\$20.40), were rejected and disallowed by said board of town auditors for no valid reason whatever, that he had during the period mentioned in said bill for two hundred and fifty dollars (\$250), performed various valuable services as health officer of the town of Albion, N. Y., and that the expenses contained in his said bill for twenty dollars and forty cents (\$20.40) were reasonable and necessarily expended by him as aforesaid, and that there was no legal reason why said board of town auditors should have rejected and disallowed said 1905 bills and accounts, or either of them. That neither of said bills or accounts have ever been paid, nor any part thereof.

Twelfth: That no previous application for a writ of certiorari has been made herein.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued and allowed by this honorable court directed to Hervey Blood, J. Frank Kirby and Seymour Olmstead, as and constituting the board of town auditors of the town of Albion, N. Y., commanding them to serve and return to this court all and singular its proceedings, decisions and actions as such board in the premises, together with all evidence, data, writings, minutes and memoranda upon which they proceeded as such board or arrived at their determination and conclusion in the premises, to the end that said determinations, conclusions and proceedings as such board may be reviewed and corrected, and that they or their successors in office as such board be ordered to audit and allow said bills or accounts at the sums of two hundred and fifty dollars (\$250), and twenty dollars and forty cents (\$20.40), respectively, together with interest thereon from the date of this petition, and that your petitioner have such other and further relief as to the court may seem just.

Dated, November 20, 1905.

FRANK G. SHERWOOD,

Petitioner.

(Title.)

Order for Writ with Stay.

(Caption.)

On reading and filing the petition of Louis Bevier, of the said town of Marbletown, the above applicant, verified on the 7th day of December, 1906, on motion of A. S. Newcomb, attorney for said applicant, it is

Ordered, that a writ of certiorari as prayed for in the said petition be issued, directed to the board of supervisors of the county of Ulster.

That said writ be returnable within twenty days after service thereof, at the office of the clerk of the Supreme Court in and for Ulster county, in the city of Kingston, and that said writ be allowed and signed and sealed by the clerk of this court.

The court hereby, in its discretion, dispenses with notice of the application for the writ in this matter.

It is further ordered that the execution of the determination by said board of supervisors to impose, levy and assess upon the taxable property of said town of Marbletown, and collect from said town the sum of three thousand one hundred and nine dollars and eighty-one cents (\$3,109.81), to apply toward the payment of the alleged costs and expenses of said board of supervisors as respondents in appeals by the said town of Marbletown and the city of Kingston, to the State assessors of the State of New York, from the decision of said board in the equalization and correction of the assessment-rolls of the different towns in said county of Ulster, and the said city of Kingston, in the year 1905, be stayed, and the said board of supervisors is hereby restrained and enjoined from imposing, levying or collecting said sum, or inserting the same in the tax-roll of said town of Marbletown for the purpose aforesaid, and said board of supervisors are further restrained and enjoined from inserting in the tax-roll of said town, or levying or assessing any sum upon the taxable property of said town, for the costs or expenses of the respondent on said appeal, pending this certiorari, or until further the order of this court.

That the relator, being a public officer, and the writ issuing on behalf of a municipal corporation, no security is required.

Enter in Ulster county.

SAMUEL EDWARDS,
Justice Supreme Court.

Writ to State Officer.

THE PEOPLE OF THE STATE OF NEW YORK, ON
THE RELATION OF CHARLES G. BURN-
HAM, OF THE CITY OF NEW YORK, TO
EDWARD F. JONES, JAMES W. HUS-
TED, FREDERICK COOK, ALFRED C.
CHAPIN, LAWRENCE J. FITZGERALD,
DENIS O'BRIEN, AND ELNATHAN
SWEET, COMMISSIONERS OF THE LAND
OFFICE.

112 N. Y. 618.

WHEREAS, we have been informed by the petition of Charles G. Burnham, verified on the 15th day of December, 1887, that a hearing has been had heretofore before you, as Commissioners of the Land Office, upon a certain application by the Bartholomay Brewing Company for a grant of lands under the waters of Lake Ontario, adjacent to and in front of certain premises in the village of Charlotte, county of Monroe and State of New York, and that the said Charles G. Burnham appeared upon the said hearing and duly objected to the issuing of the said grant in form and to the extent applied for, on the ground that the said application covered lands under the water in front of and adjacent to premises owned in fee-simple by said Charles G. Burnham, and of which lands the said Bartholomay Brewing Company was not the owner, and after hearing the parties and after maps, certified copies of deeds, original deeds, exhibits and other papers and evidences had been submitted, the said application of the said Bartholomay Brewing Company was granted, and that injustice thereby has been done to the petitioner, in that lands under water in front of

and adjacent to the premises of which the petitioner is the sole owner in fee-simple, have been, or are about to be granted to the Bartholomay Brewing Company in violation of the law and of the rights of the said petitioner; and the said petitioner, among other things, prays that a writ of certiorari issue out of this court to bring up the proceedings had by and before you as to said commissioners in reference to the subject-matter, to the end that the same might be reviewed and the errors so alleged might be corrected, or for any other or further relief as may be just and proper.

We being willing to be certified of your proceedings as such commissioners, in making the determination to grant the application of the said Bartholomay Brewing Company as aforesaid, and in all things relating thereto, we do command you that within twenty (20) days after the service thereof upon you, you do certify a return to us at the office of the clerk of the county of Albany, in the city of Albany, all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all and singular the evidence, documents, records, deeds, maps and all other papers before you or which were submitted to you concerning the said matter, or papers offered or filed with you as such commissioners in relation thereto, with your determination as said commissioners, to the end that your said decisions and actions as said commissioners may be reviewed and corrected on the merits by this court; and that the aforesaid error of said commissioners may be corrected according to law, and that the said action or determination of the said commissioners may be reviewed or corrected according to law as to the court may seem just.

Witness, the Hon. Charles R. Ingalls, one of the justices of the [L. S.] Supreme Court, at the courthouse, in the city of Albany, on the 15th day of December, 1887.

(Indorse allowance by Judge.)

ROBERT H. MOORE.

Writ of Certiorari.

THE PEOPLE OF THE STATE OF NEW YORK TO
WILLIAM F. BAKER, AS POLICE COM-
MISSIONER OF THE POLICE DEPARTMENT OF
THE CITY OF NEW YORK.

203 N. Y. — .

Greeting: Being informed in our Supreme Court of the State of New York, by the petition of George A. Mencke, dated the 7th day of September, 1909, that in certain proceedings lately had before your predecessor, Theodore A. Bingham, divers errors have been committed to the prejudice of the said George A. Mencke, and being willing for certain reasons to be certified of his judgment, actions and proceedings thereon, and of all affidavits, petitions, notices, writing, documents, and his action, proceedings and other writings before him or now before you in relation thereto.

We therefore do command you, that you certify and send to the office of the county clerk of the county of Kings, borough of Brooklyn, within twenty (20) days after the service of this writ, exclusive of the day of service, all and singular the act, acts and proceedings by your said predecessor had in the premises, and all orders and affidavits, petitions, notices, writings, documents and other proceedings and things before him, together with his action, decision and proceedings in the

premises of the removal of George A. Mencke, heretofore a member of the police department of the city of New York, at or in any way or manner relating thereto with this writ, and that we shall thereupon cause to be done in the premises what shall be of right and according to law.

Witness, Hon. Joseph Aspinall, one of the justices of our Supreme Court in the city of New York, borough of Brooklyn, on this 10th day of September, 1909.

By the Court:

FRANK ELDERS,
Clerk.

(Seal)

GRANT & ROUSS,

Attorneys for Relator.

The foregoing writ is hereby allowed this 10th day of September, 1909.

J. ASPINALL,

Justice of the Supreme Court of the City of New York.

Writ of Certiorari.

NEW YORK SUPREME COURT—NEW YORK COUNTY.

<p>THE PEOPLE OF THE STATE OF NEW YORK, ON THE RELATION OF JOHN W. LISK, TO THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, AND TO ANY OTHER PERSON HAVING CUSTODY OF THE RECORDS DESCRIBED BELOW.</p>	<p>} 203 N. Y. —.</p>
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WHEREAS, we have been informed by the verified petition of John W. Lisk, dated July 18, 1910, that certain proceedings were had before you on the 3d, 10th and 17th days of March, 1910, on complaint of Mr. Patrick Jones, superintendent of school supplies of the board of education of the city of New York, charging the relator with incompetency and misconduct in improperly weighing coal, whereby divers errors were made in said proceeding prejudicial to the rights and interests of the relator, and we being willing for certain reasons to be certified of such proceedings before you, do demand and strictly enjoin you that you do certify and return these proceedings with all things appertaining thereto, within twenty days after service upon you of this writ, at the office of the clerk of the county of New York, at the county courthouse, borough of Manhattan, in the city of New York, under your hand, as fully and amply as the same remain before you, so that our Supreme Court may further cause to be done thereupon what of right, and according to law, ought to be done and have you then and there this writ.

Service of notice for application for this writ being hereby dispensed with.

Witness, the Hon. Leonard A. Giegerich, one of the justices of our Supreme Court at the county courthouse, in the borough of Manhattan, city of New York, on this 23d day of July, 1910.

[L. S.]

By the Court,

WM. F. SCHNEIDER,

Clerk.

Order Quashing Writ.

(Caption.)

THE PEOPLE *ex rel.* THE FOREST COMMISSION,*agst.*

FRANK CAMPBELL, COMPTROLLER.

152 N. Y. 56.

The above-entitled proceeding coming on for argument, and the same having been argued at the September Term of this court on the writ of certiorari issued herein, the papers on which the same was granted, and the return of the Comptroller thereto, and the defendant having made and filed a motion to quash the said writ, and the relator having read and filed in opposition thereto, the appointment of attorney and authorization of proceeding with approval of Comptroller and Attorney-General, dated January 26, 1892; defendant's notice of appearance herein dated on or about May 12, 1892; stipulation as to settlement of return and stipulation as to argument, May Term, 1894: now, after hearing Mr. Frank E. Smith, of counsel for defendant, in support of said motion, and Mr. William P. Cantwell, of counsel for the relator, in opposition thereto, and due deliberation had thereon, and on motion of Weed, Smith & Conway, attorneys for the defendant, it is

Ordered, that said writ of certiorari issued herein be, and the same is, quashed with fifty dollars costs, and printing disbursements to be taxed by the clerk of Albany county, on the ground that the relator, the Forest Commission, has no power or authority in a case like this to obtain or prosecute such writ.

JAS. D. WELCH,
Clerk.

Return to Writ.

(Title.) (People *ex rel.* Miller v. Wurster, 149 N. Y. 549.)

The return of Frederick W. Wurster, commissioner of the fire department of the city of Brooklyn, to writ of certiorari hereunto annexed:

By virtue of and in obedience to the writ of certiorari hereto annexed, and to me directed, I hereby certify and return to the Supreme Court that I have annexed hereto and filed herewith all the proceedings and other matter specified and required by said writ.

In witness whereof I have hereunto set my hand and seal this day of February, 1895.

FREDERICK W. WURSTER,
Commissioner.

(Add copies of charges and specifications preferred against petitioner by the foreman or other officers of the fire department showing cause for removal.)

Return to Writ.

(Title.) (People *ex rel.* Cook v. Hildreth, 126 N. Y. 361.)

To the Supreme Court of the State of New York:

The return of Egbert Hildreth, Erastus F. Post and William R. Perring, as commissioners of highways of the town of Southampton, in the county of Suffolk, to the writ of certiorari hereto annexed:

Obedient to the command of said writ we do hereby certify and return as follows, viz.: On or about March 14, 1887, the said (insert commissioners' names), as commissioners of highways aforesaid, received an application from John L. Cook and William H. Cook, the relators herein, and others to lay out a highway as described in the affidavit or petition for the writ of certiorari, of which the following is a copy: (insert copy of petition for new highway).

On or about the 16th day of March, 1887, there was served on William R. Perring, one of the said commissioners, on James H. Foster, justice of the peace, of said town, and on Henry A. Fordham, the clerk of said town, a notice of which the following is a copy: (insert notice for drawing of a jury).

On the 26th day of March, 1887, at ten o'clock in the forenoon on that day Henry A. Fordham, as town clerk aforesaid, drew a jury as specified in said notice in the presence of said William R. Perring and of William H. Cook, one of the applicants, and the said town clerk thereupon made his certificate of the drawing of such jury, and the same was on the same day delivered to the said James H. Foster, as justice of the peace.

That the said James H. Foster thereupon, on the 28th day of March, 1887, as justice of the peace, issued a summons for said jury to meet near the water mills in said town on the 11th day of April, 1887, at twelve o'clock noon, to examine and to certify as to the necessity of said proposed highway, of which summons the following is a copy: (insert copy).

Said summons was delivered to and served by Oliver Fanning, the constable of said town, on the 30th and 31st days of March, 1887, more than six days before the time appointed for the meeting of the said jury. At the appointed time and place the twelve jurors drawn and summoned appeared and were duly sworn to well and truly certify as to the necessity of the proposed highway.

After first viewing the route of the proposed highway and hearing statements for and against said application, the jurors present made and signed and delivered to said commissioners of highways a certificate, of which the following is a copy: (insert copy as to necessity of highway by jurors).

That on April 30, 1887, the said certificate of said jurors was filed by said commissioners of highways in the office of the town clerk of the town of Southampton. That more than three days before April 21, 1887, a notice of which the following is a copy, was personally served upon the occupants of the land through which the proposed highway was to run, viz.: (insert copy).

(Here insert copy of notice of meeting of the commissioners to decide upon the application made for the road.)

That in accordance with the said notice the said commissioners of highways met and laid out said proposed highway, and made and signed an order of which the following is a copy and said order was recorded and filed in the office of the clerk of the town of Southampton and duly posted by said town clerk on the 30th day of April, 1887: (insert notice of decision).
(Signed and verified.)

Return by Town Board.

(Title.) (People ex Leitner v. Sipple, 109 App. Div. 788.)

To the Supreme Court of the State of New York:

The return of Edwin B. Sipple, Porter S. Tygert and George Esslinger as the town board of audit of the town of Orangetown, Rockland county, N. Y., in obedience to the writ of certiorari issued out of the Supreme Court and dated the day of January, 1905, respectfully alleges and shows, and the said board of audit for such return certifies and returns:

1. The said board of audit admits that Edwin B. Sipple, Porter S. Tygert and George Esslinger now are and at all the times herein-after mentioned and mentioned in the petition of the said relator dated the 27th day of December, 1904, and verified the 28th day of December, 1904, were members of and constituted the town board of audit of the said town of Orangetown aforesaid.

2. The said board of audit certifies and returns that it denies that George A. Leitner was on the 5th day of January, 1905, nominated by the board of health of the town of Orangetown for the appointment of health officer of said town, and it alleges and shows on information and belief that on the 5th day of January, 1905, the town board of health of said town of Orangetown assumed to appoint George A. Leitner, M. D., to be the health officer for the town of Orangetown for the term of four years at a compensation of one hundred dollars (\$100), yearly.

3. That the board of audit certifies and returns upon information and belief that on or about the 10th day of February, 1904, Daniel Lewis, Commissioner of Health of the State of New York, without any nomination otherwise than as herein aforesaid, attempted to appoint the said George A. Leitner the health officer of said town of Orangetown for a term of four years.

4. The said board of audit on information and belief denies that the said George A. Leitner discharged his duties as such health officer aforesaid, and denies that he made to the board of health of said town a monthly written report of the matters under his supervision as such health officer, and upon information and belief allege and state that the only written report made by him was a monthly report as physician to certain institutions to which he was attached, and denies that he met with said board of health whenever his presence was necessary, or whenever any matters relating to his official duties required his attendance, or that he faithfully or conscientiously discharged the duties devolving upon him as such health officer.

5. The said board of audit admits that the said George A. Leitner, on or about the 4th day of October, 1904, presented to said board of audit for audit against the town of Orangetown aforesaid his bill for services as health officer of said town for the sum of one hundred dollars (\$100), for the year 1904, duly verified.

6. The said board of audit certifies and returns that they deny that they were without lawful authority, or arbitrarily, or unlawfully disallowed said claim to the extent of seventy-five dollars (\$75), and admit that whether lawfully or unlawfully, they did audit said claim to the extent of twenty-five dollars (\$25.)

7. The said board of audit certifies and returns that the office of health officer of the town of Orangetown is not a town office, but is an office of the government of the State of New York, and that no appointment to any such office can be made by any local authority or elected by the people, but that such appointment can only be made by the State Commissioner of Health of the State of New York upon the nomination of the local board of health, and that the salary attached to such office is a State charge, and is not made a town charge by any statute of the State of New York so far as the same has come to the knowledge of the said board of audit.

8. The said board of audit further certifies and returns that the said salary or compensation of one hundred dollars (\$100) per year was

not within the discretion of said board of audit to examine, allow or disallow, unless they were authorized to examine the same and whether the services for which claim has been performed, and disallow the whole of the same if the services had not been performed, and reduce the same, if the services had only been partially performed.

9. The said board of audit further certifies and returns that at the time of the presentation of said bill or claim of the relator, to wit, on the 4th day of October, 1904, the period of one year for which said claim was made had not elapsed since the 10th day of February, 1904, but that only nine months and six days thereof had elapsed, and that if the said relator had fully performed his duties as such health officer, he had not served and performed the same for the term for which he claimed in such bill of compensation.

10. The said board of audit further certifies and returns that upon the presentation of said claim and the taking up of the same by the said board of audit for examination, the said board made due and diligent inquiry concerning the said claim and the services performed for which said claim was made, and that from information communicated to the said board of audit by the town clerk of the town of Orangetown, who is also the clerk of the board of health of the town of Orangetown, and by the supervisor of the town of Orangetown, who is also the presiding officer of the board of health of the town of Orangetown, and the board of audit from such information so communicated by said public officers, ascertained and determined that the said George A. Leitner had not performed his duties as such health officer; that he had failed to make monthly written reports of the matters under his supervision as such health officer; that during the said period from the 10th day of February, 1904, to the 4th day of October, 1904, the said board of health of the town of Orangetown had held eight regular meetings and: special or extraordinary meetings, and that out of all of said meetings the said George A. Leitner had attended only one meeting, and that although requested on many occasions by the presiding officer of said board of health to attend certain of said meetings to give information and advice and perform duties officially as such health officer concerning the discharge of duties rightfully and lawfully required of him and necessary to the discharge of the duties of said board of health in caring for the public health, he, the said George A. Leitner, had absented himself from such meetings, had not attended same, and had by lack of his attendance prevented the said board of health from discharging its duties, and he, the said George A. Leitner, as an excuse for his said neglect and omission to discharge his duties, had alleged and stated that his private business as a physician prevented him from attending such meetings, and that as the physician to St. Dominic's Orphan Asylum he was required to attend as physician thereto at the times when the said board of health met and required his attendance, and he chose to attend such other business in preference to attending the said meetings of the said board of health and discharging his duties as health officer thereof.

11. The said board of audit further certifies and returns that in consideration of said failures and omissions and refusals of said George A. Leitner to perform his duties as such health officer as aforesaid, and exercising the discretion, if discretion belonged to them in the premises, they did disallow seventy-five dollars (\$75) of the said bill and claim and allowed twenty-five dollars (\$25) only thereof.

12. The said board of audit further certifies and returns that in all their acts aforesaid they proceeded as required by the statute in examining, investigating and acting upon said bill and claim of the said relator, and that said audit at twenty-five dollars (\$25) was honestly and fairly made, and made as they believed their duty to be, and not arbitrarily or willfully or unlawfully, unless indeed they had no discretion in the matter, in which case they allege that the said bill and claim was not a subject of audit at all, and unless as they now claim, the said bill and claim of the said George A. Leitner was not a town charge and was not properly before them for audit at any time or in any sense.

All of which we hereby certify and return as commanded by said writ and as required by the statute in such case made and provided.

In witness whereof, the said Edwin B. Sipple, Porter S. Tygert and George Esslinger as town auditors, and as composing the said board of audit of the town of Orangetown, Rockland county, N. Y., have hereunto set their hands this 2d day of

[L. s.] February, 1905.

E. B. SIPPLE,
PORTER S. TYGERT,
GEO. W. ESSLINGER,

Town Auditors of the Town of Orangetown and Composing the Board of Audit of Said Town.

CHILDREN, ADOPTION OF.

See ADOPTION OF CHILDREN.

CIVIL CONTEMPTS.

See CONTEMPTS.

CLAIMS, BOARD OF.

ARTICLE.

- I. STATUTORY PROVISIONS. Code §§ 263-281; Forest, Fish and Game Law, §§ 49, 65, 370.
- II. JURISDICTION AND POWERS, 370.
- III. DECISIONS UPON QUESTIONS OF LAW AND PRACTICE, 376.
- IV. APPEALS, 378.

ARTICLE I.

STATUTORY PROVISIONS. CODE §§ 263, 281; FOREST, FISH AND GAME LAW, §§ 49, 65.

These provisions are not quoted here, as reference can be readily had to the Code and Statutes.

The provisions of the Code, sections 263 to 281, inclusive, confer jurisdiction upon the Board of Claims and regulate the manner in which it shall be exercised. This tribunal when first organized was known as the Board of Claims. By chapter 36 of the Laws of 1897 its title was changed to Court of Claims, under which name it continued until 1911. By chapter 856 of the laws of that year the designation was again changed to the Board of Claims with the same jurisdiction as theretofore.

Sections 49 and 65 of the Forest, Fish and Game Law confer jurisdiction on this board to determine claims for lands taken by the State for the Adirondack and Catskill parks.

ARTICLE II.

JURISDICTION AND POWERS.

The necessity for a tribunal for the adjustment and allowance of claims by citizens against the State arose out of the well-settled principle that a sovereign cannot be sued.

It is said by Chief Judge Taney in *Beers v. State of Arkansas*, 20 How. (U. S.) 527 (529): "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and con-

ditions on which it consents to be sued, and the manner in which the suit will be conducted; and may withdraw its consent whenever it may suppose that justice to the public requires it."

And by Mr. Justice Miller, in *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451; cited in *Hans v. Louisiana*, 134 U. S. 1 (17): "It may be accepted as a point of departure unquestioned that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Rapallo, J., in *People of the State of New York v. Dennison*, 84 N. Y. 272 (281), stated this principle in the following language: "While the government may, through its courts, enforce its claims against its citizens, the right is not reciprocal. A set-off is in the nature of a cross-action, and the government cannot be sued except by its own express permission. This is a universal principle applicable to every sovereignty, and often recognized in the courts of the United States;" cited with approval by Finch, J., in *Rexford v. State of New York*, 105 N. Y. 229 (231), the court holding that the State can only be used by its consent and for liabilities which it chooses to assume.

This is followed by the opinion of Andrews, J., in *Stone v. The State*, 138 N. Y. 124 (130). The State is only answerable before the Board of Claims in respect to matters which it has consented to submit to its jurisdiction. The sovereign can be impleaded for the recovery of claims against it only in the mode, and to the extent, and as to such matters as the Legislature has authorized."

The principle was reiterated by O'Brien, J., in *Locke v. The State*, 140 N. Y. 480.

The present Court of Claims had originally the jurisdiction of the canal appraisers, having been constituted as the Board of Claims by chapter 205 of the Laws of 1883, with the powers which canal appraisers had under chapter 321 of the Laws of 1870. *Locke v. State*, 140 N. Y. 480.

Remington v. The State, 116 App. Div. 522, 101 Supp. 952, *supra*, holds that by the amendment of 1906 the jurisdiction of the court is limited to claims arising upon or out of contracts with the State or an appropriation of lands by the State. *Nusbaum v. State*, 119 App. Div. 755, 104 Supp. 527, that an attorney appointed by a committee of the Assembly, pursuant to a resolution of that body author-

izing the appointment of counsel to such committee, may sue in the Court of Claims without a special enabling act, since the court has jurisdiction over claims of that character accruing within two years under section 264.

In the Nusbaum case the appeal was dismissed, 190 N. Y. 542, without costs and without opinion.

In *Quayle v. State of New York*, 192 N. Y. 47, aff'g 124 App. Div. 81, the question of jurisdiction again came up in the Court of Appeals. Chief Judge Cullen discussing section 264 of the Code holds that the view taken by the Court of Claims is erroneous. That the breach of its contract by the State creates a valid cause of action and the immunity from suit, arising from its sovereignty, merely prevents its enforcement. When, however, the State confers upon the court jurisdiction to hear and determine all claims against it, or all claims of a particular class, the situation in that court is the same as if the case was against a private individual or corporation; and distinguishes cases in which the claims against the State on moral or legal obligations which the State may recognize or refuse to recognize at its pleasure; holding that in cases of that character it is necessary that there should be a statute expressly authorizing the Court of Claims to hear and adjudicate the claims; but that in all other cases the court has power, without special statute, to determine the validity of a claim, unless it is of the character which, by the terms of the Code, is withdrawn from its jurisdiction.

It was held in *Litchfield v. Bond*, 105 App. Div. 229, 93 Supp. 1016, that the State is liable to the landowner for damages which he sustained by reason of a survey made by the State Engineer and Surveyor, and that the Court of Claims had jurisdiction to hear and determine the landowner's claim. Reversed in 186 N. Y. 66, upon the ground that the State as an entity cannot commit a trespass. It is liable for the tortious acts of its agents only in special instances expressly created by law. That the fact that by an act passed after the commission of the trespass the Court of Claims was authorized to determine the damages resulting from such trespass does not relegate the landowner to that court as the only forum in which he can prosecute his claim therefor, where such act expressly disclaims the creation or acknowledgment of any liability upon the part of the State.

In *William v. State of New York*, 94 App. Div. 489, it was held that an act authorizing the presentation of a claim to the Court of

Claims is nothing more than a waiver by the State of its rights of a sovereign to decline to answer in its own courts; and an authority to the Court of Claims to award judgment against it upon any state of facts that would warrant a recovery were the claim against a citizen of the State, and that nothing more was intended thereby.

The Appellate Division, in the absence of a finding by the Court of Claims as to the amount of damage, is without jurisdiction to make a new finding as to damages in accordance with the evidence, and can only grant a new trial when the award is insufficient. The Appellate Division has only the same power to affirm, reverse, or modify a judgment of the Court of Claims that it has in respect to judgments of the Supreme Court. *Crowley v. State of New York*, 112 App. Div. 872, 98 Supp. 1094.

In *Lewis v. State of New York*, 96 N. Y. 71, it was held that neither chapter 444 of the Laws of 1876, establishing a board of audit, nor chapter 205 of the Laws of 1883, establishing a board of claims, created a liability on the part of the State for the negligence or malfeasance of its servants; but under the act authorizing the appraisal of claims against the State founded upon negligence of its officers in the use and management of the canals, a recovery may be had for injury caused by such negligence, where an action could have been maintained under section 1902 of the Code, and the State is liable whenever an individual engaged in a similar enterprise would be liable. *Sipple v. State*, 99 N. Y. 384, 16 Abb. N. C. 429; *Splittorf v. State*, 108 N. Y. 205; *Bowen v. State*, 108 N. Y. 166.

The Legislature has no power to confer jurisdiction on the Board of Claims to allow an award upon a claim barred by the Statute of Limitations. *Gates v. State*, 128 N. Y. 221, 40 St. Rep. 87.

In *Rexford v. State*, 105 N. Y. 229, it was held that under chapter 321 of the Laws of 1876 a claim against the State for personal injuries could be sustained by a person rightfully passing upon the berme bank of the canal while climbing up the side of the bridge, upon the irons provided for that purpose, when a loose stone on the top fell out and threw him to the ground. Notwithstanding an act authorizing an abandonment of the canal, the State is still liable for injuries suffered from failure to keep in repair the bridges which it still maintains, and the Court of Claims has power to award damages for such injuries. *Woodman v. State*, 127 N. Y. 397, 38 St. Rep. 940.

But on the hearing of a claim for damages sustained by an overflow caused by negligence in not keeping in repair the guard bank of the river made necessary in the construction of the canal, where it appeared that the State had abandoned and sold the canal and the lands connected therewith more than seven years before the claim accrued, it was held the Board of Claims had no jurisdiction to consider the claim. *Stone v. State*, 138 N. Y. 124, 51 St. Rep. 718.

The act of 1885, chapter 238, providing for the determination by the Court of Claims of the claims of certain persons while acting as captain and harbor-master of the port of New York, and ratifying and legalizing their acts, is not contrary to article 3, section 19 of the Constitution. *Cole v. State*, 102 N. Y. 48. Under article 7, section 4, of the Constitution, providing that no one acting on behalf of the State shall audit, allow, or pay any claim which, as between citizens, would be barred by lapse of time, claims are not barred which have been duly presented for payment or allowance. Such claims need not be presented to the board of audit or the Court of Claims, but presented to the Legislature or to any officer or body having jurisdiction to pay, allow, or act upon the claim; and the prosecution thereof with reasonable diligence is enough to suspend the running of time against the claim. *Corkings v. State*, 99 N. Y. 491, 16 Abb. N. C. 448.

This constitutional prohibition does not apply to a claim for services and materials furnished State officers, nor enforceable in any tribunal until it receives legislative recognition. *O'Hara v. State*, 112 N. Y. 146, 20 St. Rep. 647.

In *Parmenter v. State*, 135 N. Y. 154, 48 St. Rep. 129, it was held that in a case where the statute left but a very short period within which to present a claim, and it appeared that the claimant was engaged in trying to collect it by mandamus proceedings against the State Comptroller, and that much of the delay was caused by the non-action of the courts which the claimant was powerless to prevent, the Statute of Limitations did not run against the claim. This case was cited with approval in *Supervisors of Cayuga Co. v. State*, 153 N. Y. 279, which held that the limitation imposed by the Constitution upon the audit allowance or payment of the claims against the State only applies where a tribunal has been constituted by the Legislature to hear and determine the controversy, and only commences to run from the time of the constitution of such tribunal.

In *Peck v. State*, 137 N. Y. 372, it was held that under the circumstances of that case the claim was barred by the Statute of Limitations and that the Court of Claims had no power to pass upon it. Where land is taken for canal purposes, the year in which the claimant is required to file his claim does not begin to run as to lands permanently appropriated until the quantity has been determined and the boundaries described on the maps or marked on the ground by monuments. *Yaw v. State*, 127 N. Y. 190, 38 St. Rep. 60.

Chapter 321 of the Laws of 1870 does not confer a new jurisdiction to hear claims against the State for the taking of the fee in lands or for the appropriation of a continuous and permanent easement therein for canal purposes. *Benedict v. State*, 120 N. Y. 228.

A claim for money paid for taxes under section 315 of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906, afterward held by the Court of Appeals to be unconstitutional, cannot be sustained against the State, the State never having consented to waive its sovereignty and to be sued in such a case.

It is the intention of the Tax Law that such a claim should be submitted to the Comptroller; and, not being founded upon express contract, it does not come within the exception contained in section 264 of the Code of Civil Procedure. *Flower v. State of New York*, 65 Misc. 145, 121 Supp. 96.

It was the intention of the Legislature, expressed in section 264 of the Code of Civil Procedure, that the Court of Claims should have jurisdiction in those cases where death is caused by a wrongful act, neglect, or default upon the part of the State.

The right given to prosecute a private claim against the State in the Court of Claims to recover damages for a wrongful act, neglect, or default on the part of the State, by which the death of any person has been caused, is not confined to residents of this State; but such a claim may be prosecuted by a resident of another State. *Burke v. State of New York*, 64 Misc. 558.

The jurisdiction of the Court of Claims to order the bringing in of other parties is by section 281 of the Code of Civil Procedure limited to cases against the State, wherein the sovereign power has consented to be sued.

Where a claim is against the State for damages for an alleged breach of contract for the building and construction of a so-called good road in the county of Orange, a motion for an order bringing in said county before the court as one of the parties defendant will

be denied for want of jurisdiction. *Elmore & Hamilton Con. Co. v. State of New York*, 62 Misc. 58, 115 Supp. 1071.

A lease is an incumbrance, and the value of a leasehold interest in property taken for canal purposes must come out of the amount agreed to be paid to the owner of the property as provided by section 88 of the Canal Law. The holder of the leasehold interest has no claim against the State, but his claim is against the fund.

The Court of Claims is a statutory court having only such powers as are conferred upon it by the statute creating it and which come within the authority of the Legislature to enact; and upon a claim by the lessee where not only the value of a lease is in issue, but also its validity, upon both of which questions the owner of the property is entitled to be heard, the Court of Claims, unless by his consent, has not jurisdiction to determine such issues which under the Constitution are triable in the ordinary constitutional courts. *Moroney v. State of New York*, 67 Misc. 58, 124 Supp. 824.

ARTICLE III.

DECISIONS UPON QUESTIONS OF LAW AND PRACTICE.

The practice in this tribunal is regulated by rules established by it, which contain forms for presentation of claims and in all other respects regulate the procedure. A copy of these rules will be furnished by the clerk of the court on application.

It was the intention of the Legislature, in giving jurisdiction to this tribunal, that "just compensation" pursuant to the Constitution should be awarded to its citizens for property taken, "conformable to rectitude and justice," "not doing wrong to any," and "violating no right or obligation;" that the claim should not transgress the requirement of truth or propriety; that unconscionable claims should not be allowed against the sovereign power, and that its citizens could not buy, lease, or procure property simply for the purpose of obtaining greater damages against the State; that the citizen should have a forum to which he could come and receive just compensation for property equitably owned, in good faith obtained and justly held, which was taken by the State. The Legislature provided a direct method by which the citizens could appeal to this court, and the State's liability was to be determined upon such legal evidence as would establish such liability against an individual or corporation in a court of law or equity. *Champlain Stone & S. Co. v. State of New York*, 66 Misc. 434 (445), 123 Supp. 546.

A plaintiff in the Court of Claims who, having recovered against the State for an appropriation of her lands, has failed to file with the Comptroller the vouchers and other papers required by section 269 of the Code of Civil Procedure, is only entitled to interest for twenty days after her recovery, where the Comptroller has funds upon which he could have drawn a warrant for the payment of the judgment. She is not entitled to interest for the period covered by an unsuccessful appeal from the judgment in her favor.

Although section 269 of the Code of Civil Procedure requires as a prerequisite to payment of a judgment against the State that a certificate of the Attorney-General be filed stating that no appeal will be taken, a plaintiff who has failed to notify the Attorney-General of her judgment, so as to limit his time to appeal, gains no right to a longer period of interest because such certificate was not filed.

Nor can she complain because the Attorney-General failed to furnish the Comptroller with the searches and certificates required by said section, where she has not served a copy of her judgment upon either of said officers, for until such service they owed to her no active duty. *People ex rel. Evers v. Glynn*, 126 App. Div. 519, 110 Supp. 405.

Where land has been appropriated for a State canal and the evidence both on the part of the claimant and the State places the damages at a certain sum the judges of the Court of Claims cannot award a less sum on the theory that they are personally capable of assessing the damage as experts. *Burchard v. State of New York*, 128 App. Div. 750, 113 Supp. 233; appeal dismissed, 195 N. Y. 577.

Where a claim was presented and proved under the act of 1870 for continuous damages, part accruing within two years, the claimant is entitled to recover damages accruing within that period; it is only prior damages that are barred. *Folts v. State*, 118 N. Y. 406.

A claim against the State for extra work done under a contract to do certain printing for each of the legislative sessions is one which in its nature would bear interest from the time it accrued, and it is proper for the Court of Claims to award it. *Sayre v. State*, 128 N. Y. 622, 38 St. Rep. 932.

A motion to dismiss a claimant's petition is in the nature of a demurrer and admits the truth of the facts contained therein. *Dermott v. State*, 99 N. Y. 101.

It is within the discretion of the Court of Claims whether or not to reopen a case if it has been finally submitted and a decision rendered. *Lake Side Paper Co. v. State*, 15 App. Div. 169, 44 Supp.

281. So held under a special statute authorizing an application for a rehearing of a specific claim. *Chaphe v. State*, 117 N. Y. 511.

Where plaintiff was injured by the falling of a bridge over a canal it was held that, to constitute a valid filing of the claim, there must be a delivery by or on behalf of the party at the office of the canal appraisers itself. *Gates v. State*, 128 N. Y. 221, 40 St. Rep. 87.

The rule of practice that failure to renew or make a motion for non-suit at the close of all the evidence is an admission that some question of fact is to be passed upon, and a waiver of the rights to have the complaint dismissed as a matter of law is applicable to the Court of Claims. *Spencer v. State*, 187 N. Y. 484, aff'g 110 App. Div. 585, 97 Supp. 154.

Under the statute requiring the practice in the Board of Claims to conform as near as may be to that prevailing in the Supreme Court, the decisions of the board should be in writing, signed by all or a majority of the commissioners, and separately stating the facts found and the conclusions of law. *Yaw v. State*, 127 N. Y. 190.

In rendering a decision upon the trial of issues of fact, the Court of Claims is required to state separate findings of fact and conclusions of law in conformity to the practice of the Supreme Court, as prescribed by section 1022 of the Code of Civil Procedure; and the same practice should be pursued in the Court of Claims, in respect to findings, as in the Supreme Court. *Ostrander v. State of New York*, 192 N. Y. 416, aff'g 126 App. Div. 938, 110 Supp. 1139.

On the hearing of a claim based on the giving away of a canal bridge over which claimants were attempting to roll heavy weights, it was held to be error to permit a witness for the State to testify that he left the bridge in his judgment safe for the ordinary uses of a highway bridge, and that stones of that size were an excessive load for the bridge as constructed. *McDonald v. State*, 127 N. Y. 18, 37 St. Rep. 248. It was held error to allow a claimant to introduce a record of a previous award made by the Court of Claims for a similar claim "to show the liability of the State." *Stone v. State*, 138 N. Y. 124, 51 St. Rep. 718.

ARTICLE IV.

APPEALS.

In *State v. County of Kings*, 125 N. Y. 312, 34 St. Rep. 782, it was held that no appeal would lie from an award determining claims of the State for balances due on State tax accounts, since no appeal

lies unless authorized by statute. Where a claim was wholly rejected and no award whatever made, it was held that the right to recover some sum must appear conclusively in order to raise the question of error, in the absence of an erroneous ruling adverse to the claimant. *Spencer v. State*, 135 N. Y. 619, 48 St. Rep. 442.

A statement in a notice of appeal that the court erred in receiving evidence against the objection and exception of the appellant is sufficient to point out the error where the record did not show that any other evidence than that pointed out was admitted against objection. *McDonald v. State*, 127 N. Y. 18, 37 St. Rep. 248. Where an award is modified by the Court of Appeals only by increasing it the modified award bears interest from the same date as the original award. *Sayre v. State*, 128 N. Y. 622, 38 St. Rep. 932.

Where the Appellate Division has unanimously affirmed a judgment entered upon a decision of the Court of Claims, the Court of Appeals may assume that the findings made by the Court of Claims were supported by the evidence. Where it appears, however, that such findings are incomplete and do not sustain the judgment, but there is evidence which would have warranted the Court of Claims in making findings in addition to those made which would be sufficient to sustain the judgment, it is the duty of the Court of Appeals to infer or assume such findings in support of the judgment. *Ostrander v. State of New York*, 192 N. Y. 416, aff'g 126 App. Div. 938, 110 Supp. 1139.

No appeal lies to the Court of Appeals from any tribunal unless authorized by the statute. An appeal lies from the Board of Claims only in cases specially provided for by statute; and as the act of 1884, chapter 318, authorizing the Board of Claims to hear and determine the claims of the State against certain counties did not provide for an appeal from their determination to the Court of Appeals, the latter court has no jurisdiction to overrule their action. *State v. County of Kings*, 125 N. Y. 312.

Under the acts regulating an appeal to the Court of Appeals from a decision of the Board of Claims, only questions of law are open to consideration, except that the court may pass upon the insufficiency or excessiveness of the damages awarded. *Bowen v. State*, 108 N. Y. 166.

Where an appeal is taken from the Board of Claims by a claimant, on the ground of the insufficiency of the award, the Court of Appeals cannot interfere unless, upon the uncontradicted evidence, affected

by no question of credibility, the award was inadequate, or where in ascertaining the damages the board adopted a wrong principle. *Slavin v. State*, 152 N. Y. 45.

Section 275 of the Code of Civil Procedure, regulating appeals from judgment or orders of the Court of Claims, gives no greater right of appeal than is given from orders of the Supreme Court.

An order of the Court of Claims denying the defendant's motion, made at the opening of the trial, for a dismissal of the complaint is not appealable; the defendant's remedy is by an appeal from the judgment. *Withers v. State of New York*, 61 App. Div. 251, 70 Supp. 451.

The Court of Appeals has jurisdiction upon an appeal from the Court of Claims to modify an award by increasing it to an amount of damages established by undisputed evidence. *Sayre v. State*, 123 N. Y. 291, 33 St. Rep. 156.

COMMITTEE OF A LUNATIC, IDIOT, OR HABITUAL DRUNKARD.

ARTICLE.

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ARTICLE I.

JURISDICTION AND POWER OF SUPREME AND COUNTY COURTS.

§§ 340, subd. 4, 2320, 2321.

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§ 2320. *Jurisdiction; concurrent jurisdiction, 384.*

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Subd. 1. Jurisdiction of Supreme and County Courts.

§§ 340, subd. 4, 2320.

§ 340. Jurisdiction.

The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provisions:

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness; or imbecility arising from old age or loss of memory and understanding or other cause; and to every special proceeding, which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person. . . .

§ 2320. Jurisdiction; concurrent jurisdiction.

The jurisdiction of the supreme court extends to the custody of the person and the care of the property of the person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the Supreme Court, the jurisdiction of the court first exercising it, as prescribed in this title, is exclusive of that of the others, with respect to any matter within its jurisdiction, for which provision is made in this title. In all proceedings under this title for the appointment of a committee of such a person, he shall be designated "an alleged incompetent person" and after the appointment of a committee of such person, in all subsequent proceedings the lunatic, idiot, habitual drunkard, or imbecile shall be designated "an incompetent person."

In *Sporza v. German Savings Bank*, 192 N. Y. 8, aff'g 119 App. Div. 172, 104 Supp. 260, and *Matter of Andrews*, 192 N. Y. 514, rev'g 125 App. Div. 457, 109 Supp. 831, the jurisdiction of the Supreme Court over the appointment of a committee of an insane person is considered, and earlier authorities upon the subject are collated and discussed. It is held that jurisdiction is inherent in the State over unfortunate persons within its limits who are idiots and who have been deprived of the use of their mental faculties; and it is its duty to protect the community from the acts of those persons who are not under the guidance of reason, and also to protect them, their persons, and property from their own disordered and insane acts. During the early history of the State the custody of lunatics and incompetent persons was intrusted to the chancellor and the Court of Chancery, and the proceedings with reference thereto were largely in the discretion of the chancellor; but the custom prevailed on his part, in order to inform his conscience, to require a trial by jury on the question of the insanity of the person in all cases of doubt, where proceedings were taken with reference to his commitment and the disposal of his property.

Since 1842 proceedings have been governed by legislative enactment, the Constitution of 1894 continuing the Supreme Court with general jurisdiction in law and equity to preserve the jurisdiction of the court over lunatics and their property which was originally invested in the chancellor, and the Court of Chancery transferred over to the Supreme Court, as it existed prior to the Constitution of

1846. That jurisdiction and the manner of its exercise may be regulated by the Legislature. Where this has not been done it is to be exercised according to the established practice of the courts in lunacy cases.

Incompetent persons are wards of the court, upon which a duty devolves of protection both as to their persons and property — the duty is not limited to cases only in which a committee has been appointed, but it extends to all cases where the fact of incompetency exists. *Wurster v. Armfield*, 175 N. Y. 256.

It has been held that the statement that a person is “of unsound mind and understanding and so far deprived of his reason and understanding as to be altogether unfit and unable to govern himself or manage his affairs,” was a sufficient statement of incompetency to give jurisdiction to the County Court. *Jackson v. Jackson*, 37 Hun, 308. Though section 2320 of the Code gives the courts power to declare a person incompetent to manage his affairs, yet previous to such proceedings and to such declaration by the court the lunatic is not prohibited from bringing an action, as his legal status is not changed until the court has interposed its jurisdiction and finally declared him to be of unsound mind. *Runberg v. Johnson*, 11 Civ. Pro. 283. The same rule is set forth in *Hanley v. Brennan*, 12 Civ. Pro. Rep. 151, where it is said that the court may appoint a guardian *ad litem* for a lunatic, although he has not been judicially declared insane in proceedings instituted for that purpose, and though no committee has been appointed. The court once having acquired jurisdiction by the institution of proceedings still retains jurisdiction to direct the payment of costs of the proceedings out of the estate of the lunatic, although he has died pending the confirmation of the finding of the jury. *Matter of Lofthouse*, 3 App. Div. 142. An outline of the present jurisdiction of the court is stated by Ward, J., in the *Matter of Lofthouse*, 3 App. Div. 142, as follows: “The codifiers of this Code say, in referring to this title, that they have carefully endeavored to avoid inserting statutory restrictions upon the courts, tending to deprive them of any part of the large discretion now resting in them, which it is necessary to preserve for the benefit of the unfortunate individuals to whom this title applies. The care and custody of lunatics and persons of unsound mind was formerly vested in the chancellor; but by the Constitution of 1846 and the Judiciary Act supplementing it, this power became vested in the Supreme Court and in the County Courts of the several counties, as to persons residing in those counties concurrent with

the Supreme Court, so that the original chancery jurisdiction vesting in this court upon the subject has not been circumscribed nor limited by the Code, the chapter referred to provided the procedure to be adopted in appointing the committee and defining its duties rather than defining the jurisdiction of the court over the person and property of the lunatic."

The jurisdiction of the Supreme Court over lunatics and incompetent persons is stated as follows, in *Matter of Blewitt*, 131 N. Y. 546: "The jurisdiction which formerly was vested in the chancellor over the persons and estates of lunatics is now exercised by the Supreme Court. But the Supreme Court exercises the power under the same rules as appertained to and regulated the jurisdiction of the chancellor, subject to such statutory provisions on the subject as are contained in the Code of Procedure. *Code*, § 2320 *et seq.* The power of the court to appoint a committee of the person and estate of a lunatic is very essential, but it should be exercised with scrupulous regard to the rights of the alleged lunatic and under the protection which attends other judicial proceedings affecting person or property, modified only so far as the peculiar nature of the inquiry and the condition of the alleged lunatic may render modification necessary."

The powers conferred upon the Supreme Court are similar to those formerly vested in the Court of Chancery, and the care and custody of the person and property of lunatics and others of unsound mind, which were formerly exercised by the chancellor, are now confided to the Supreme Court. *Agricultural Ins. Co. v. Barnard*, 14 Abb. N. C. 502 (508).

By subdivision 4 of section 340 of the Code of Civil Procedure, the County Courts have concurrent jurisdiction with the Supreme Court over the custody of the person and the care of the property of a resident of the county who is incompetent to manage his affairs; but by section 2320 the court, on exercising this jurisdiction, has exclusive jurisdiction with respect to any matter within its jurisdiction for which provision is made; therefore, when the County Court had first attained jurisdiction, the Supreme Court cannot make an order for the payment of the lunatic's debt. *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 738.

It seems that though the County Court is not a court of equity, yet where, by virtue of sections 340 and 2320 of the Code, it once acquires jurisdiction in proceedings for the appointment of a committee of a lunatic, that any equitable claim presented by the com-

mittee in asking for its discharge will be disposed of on equitable principles in order to save the expense and annoyance of further litigation. *Matter of Forkel*, 8 App. Div. 400. Where the original proceedings for the appointment of a committee were commenced in the County Court, that court has, by virtue of this section, exclusive jurisdiction and, therefore, is the only court having jurisdiction in any matters relating to the payment of debts of the lunatic. And where, in violation of this exclusive jurisdiction, an action is brought in the Supreme Court, the objection that the County Court has exclusive jurisdiction may be taken for the first time on appeal. *Matter of Wing*, 83 Hun, 284, 64 St. Rep. 736, 31 Supp. 941.

The court originally acquiring jurisdiction in proceedings for the appointment of a committee of an incompetent has jurisdiction to determine the allowance to the committee for compensation, counsel fees, and expenses for the board and maintenance of the lunatic and costs of the proceedings. *Matter of Bd. of St. Opening*, 89 Hun, 527, 69 St. Rep. 796.

Where proceedings have been taken in the County Court to have a person, already in a hospital, declared a lunatic, the Supreme Court will not take jurisdiction on an application for his discharge, on the ground that he was not personally served with notice of the presentation of the petition. *Matter of Bellenger*, 32 Misc. 414, 66 Supp. 531.

The power of the court is limited by the provisions of the Code, and there is no express authority given to the court, or the committee appointed by the court, to dispose of property of a lunatic. *Matter of Dunn*, 64 Hun, 20, 45 St. Rep. 830. See *Williams v. Empire Woolen Co.*, 7 App. Div. 348, for a discussion of the status of a lunatic in cases where he has not been declared a lunatic and no committee has been appointed. The court has no power to appoint a committee of a lunatic or to order a sale of his property before a commission has been issued and returned. *Ex parte Payn*, 8 How. 220.

Subd. 2. Power of Court and When Exercised. § 2321.

§ 2321. Duty of court having jurisdiction.

The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts, and for the safekeeping and maintenance, and the education, when required, of the incompetent person and his family.

General Construction Law (Consolidated Laws, chap. 22, § 28) defines "lunatic" and "lunacy" to include every kind of unsound-

ness of mind except idiocy. This was formerly Statutory Construction law, section 7.

The word "lunacy," as used in section 2335 of the Code of Civil Procedure, includes imbecility arising from old age and loss of memory or understanding. *Matter of Preston*, 113 App. Div. 732, 99 Supp. 312.

The authority of the court in proceedings for the application for the appointment of a committee in lunacy is purely statutory. The purpose of the statute is to provide for the appointment of such committee whenever the person is incompetent to manage his affairs to the end that his property may be cared for and preserved. *Matter of Clarke*, 57 App. Div. 5.

Appeal dismissed, 169 N. Y. 595, without passing upon the merits and proceedings remitted to the court below for the exercise of the discretion conferred upon it as to the confirmation of the inquisition and appointment of a committee.

The history of legislation in this State and a review of the rights of lunatics and habitual drunkards, respectively, is given in *Matter of Janes*, 30 How. Pr. 446, and *Matter of Brown*, 1 Abb. 108. In *Stewart's Executor v. Lispenard*, 26 Wend. 255, Coke, 1 Inst. 246, quoted by Blackstone, 1 Comm. 343, is cited, as to what constitutes lunacy, idiocy, and habitual drunkenness, to this effect: "*Non compos mentis* is the most legal term for all defects of the mind which the law notices. *Non compos mentis* is of four kinds:

"1. *Idiota*, which from his maturity by a perpetual infirmity is *non compos mentis*.

"2. He that by sickness, grief, or other accident wholly loses his memory and understanding.

"3. A lunatic that hath sometimes his understanding and sometimes not.

"4. Lastly, he that for a time depresseth himself by his own vicious act of his memory and understanding, as he that is drunken."

The opinion of Verplanck is referred to as a very exhaustive statement of the various definitions of lunacy and idiocy. A person may from old age become so weak and incapacitated as to justify the appointment of a commission. *Matter of Barker*, 2 Johns. Ch. 232. It is sufficient to justify a commission that a person is incapable of managing his own affairs, and this may arise from old age, infirmity, or other misfortune. *Jackson v. King*, 4 Cow. 207; *Matter of Mason*, 1 Barb. 437. The finding that the party is of unsound mind and mentally incapable of governing himself or his

affairs is sufficient; the word "lunatic" is not requisite. *Ex parte Rogers*, 9 Abb. N. C. 141.

Incompetency, under section 2320, does not include mere weakness of mind, nor lack of business capacity, still less want of business experience. *Matter of Brugh*, 61 Hun, 197. See this case for certain tests of recovery from insanity which were approved by the court. Though a belief in spiritualism may not be inconsistent with business capacity and judgment, yet where a person has become convinced in the reality of communications from the dead to a degree where the disposition of her property and her personal action is governed by the direction of deceased persons, and she is about so to dispose of her property, etc., a case is presented which calls for an investigation as to the competency of such person. *Matter of Beach*, 23 App. Div. 411. The test of the right to control property is not competency to manage a particular estate but mental health and consequent fitness for the management of the common and ordinary affairs of life. *Matter of Williams*, 24 App. Div. 251.

The finding, however, of the jury must be that the party is of unsound mind, as every case of weakness or imbecility will not justify a commission, but the mind must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Matter of Morgan*, 7 Paige, 236; *Matter of Mason*, 3 Edw. Ch. 380. It is, however, held in a late case, *Matter of Jackson*, 37 Hun, 306, citing earlier cases, and relying on *Delafield v. Parish*, 25 N. Y. 103; also citing *Riggs v. American Tract Society*, 84 N. Y. 330, that a charge to the jury that to constitute a case of unsoundness of mind, which will justify the court in assuming the control of the person and property of the person by a committee, his mind must be so far impaired that if it had never been elevated above that state of capacity from his birth, it would have constituted a case of idiocy, was erroneous, as one may be wholly incompetent to manage himself and his affairs, and still be removed from a state of idiocy, and this is doubtless the present rule. See *Riggs v. American Tract Society*, 95 N. Y. 503.

Chancellor Walworth, in the *Matter of Tracy*, 1 Paige, 580, says with reference to what constitutes an habitual drunkard: "But very erroneous impressions seem to have gone abroad on this subject. It is supposed by many that the prosecutor in such cases is bound to prove affirmatively, that an habitual drunkard is incapable of managing his affairs; on the contrary, the fact that a person is for any considerable part of his time intoxicated to such a degree as to de-

prive him of his ordinary reasoning faculties is *prima facie* evidence at least that he is incapacitated to have the control and management of his property." A man of weak mind, if not a lunatic or a fool, can contract. *Odell v. Buck*, 21 Wend. 142. An epileptic of enfeebled mind was held competent to convey property. *Sprague v. Duel*, Clarke Ch. 90; aff'd, 11 Paige, 480. A person of weak mind is liable for necessities. *Skidmore v. Romaine*, 2 Bradf. 122. A person born deaf and dumb is not necessarily an idiot. *Brower v. Fisher*, 4 Johns. Ch. 441. The appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine and not adjudication of lunacy. *Estate of Spencer*, 5 Redf. 425.

In *Delafeld v. Parrish*, 25 N. Y. 9, what constitutes imbecility and want of testamentary capacity, as distinguished from idiocy is very fully considered in the dissenting opinion of Gould, J. Selden, J., also discusses the subject in his opinion at page 103.

An idiot or natural fool is one that hath no understanding from his nativity and, therefore, is by law presumed never likely to attain any. 1 Bl. Com. 302.

People v. Lake, 2 Park. Cr. 215 defines idiot as a total want of reasoning powers growing from a malformation of the organ of thought at the time of birth.

The court of chancery has the custody and control of the person as well as of the estate of an habitual drunkard, and can exercise that control by means of a committee, as in the case of a lunatic. *Matter of Lynch*, 5 Paige, 120.

In the *Matter of Brown*, 4 Duer, 613, the nature and extent of the power to take the person and property of lunatics and habitual drunkards into especial custody was reviewed.

In *Odell v. Buck*, 21 Wend. 142, the distinction is made between idiocy and imbecility by Judge Bronson stating of the person whose mental capacity was under consideration that he was not an idiot or one that hath no understanding from his nativity, that although a man of imbecile mind, he had reason and understanding.

The necessity for the appointment of a committee is to be determined by the condition of the incompetent at the time of the hearing. Things previously done by him, such as the fact that he conveyed his property, can be considered only for the purpose of determining whether he is incompetent at the time of the hearing.

The authority of the court to appoint a committee is not to be exercised in all cases, but only where in the sound discretion of the

court it appears that a committee is necessary. *Matter of Vail*, 137 App. Div. 220, 121 Supp. 958; appeal dismissed, 199 N. Y. 560.

Ordinarily a committee of the person and estate of an infant is not appointed for the general guardian can exercise all the functions of the committee. There is, however, no legal objection to the appointment of a committee of the person and estate of an infant. *Matter of McMillan*, 126 App. Div. 155, 110 Supp. 622, citing *Francklyn v. Sprague*, 121 U. S. 215, 229, aff'g 193 N. Y. 651.

Where a lunatic has wandered from home to some place unknown, a commission could issue from the Court of Chancery. *Ex parte Ganse*, 9 Paige, 416. In the case of *The Parsee Merchant*, 11 Abb. N. S. 209, Judge Daly holds that the court has the right and it is its duty to do whatever is most conducive to the interests of the lunatic, to see that he is maintained as comfortably as his circumstances will allow, and that every effort is made to restore him to his health. The interests of the lunatic are the controlling considerations and not those of the expectant successors to his estate.

Section 2321, providing for the payment of the debts of a lunatic, includes the payment of a debt owing to the committee and incurred previous to its appointment. The court says: "We fail to see why a debt incurred prior to the appointment of a committee, even though in favor of the person appointed, should not be treated with the same consideration as though it were one existing in favor of a stranger and had been incurred in the administration of the estate." Thus claims for advances made before his appointment by the committee for the support of the two minor children of the lunatic were allowed him upon his accounting when he applied for discharge. *Matter of Forkell*, 8 App. Div. 401. The committee merely represents the courts in the exercise of its jurisdiction over the property of the incompetent person, and thus where the estate has been benefited by the collection of claims by an attorney employed to do so the court will entertain an application by the attorney for payment, and will order the committee to pay for such services from the funds. *Matter of Horton*, 18 Misc. 407. But the court has no further jurisdiction over the property of a person formerly incompetent after his committee has been discharged. It cannot compel restitution by persons to whom the former lunatic has subsequently transferred his property. *Matter of Dowd*, 19 Misc. 688.

Section 2321, empowering the court to provide for the payment of the debts of the lunatic out of the proceeds of his property, means the payment of his debts so far as his property will allow, and means

a *pro rata* distribution in case the property is not sufficient to pay all debts in full — a general or specific lien being the only exception to this rule. *Matter of Wing*, 83 Hun, 284, 54 St. Rep. 736, 31 Supp. 941.

In *Matter of Heeney*, 2 Barb. Ch. 326, it was held that the Court of Chancery had power to provide out of the surplus income of a lunatic for the support of persons not his next of kin, and whom the lunatic is under no legal obligations to support, where it satisfactorily appears to the chancellor that the lunatic himself would have provided for the support of such persons had he been of sound mind. The committee of a lunatic may also be authorized to keep up the lunatic's family establishments, as had been his custom previous to his lunacy, and to place at his disposal, so long as he is competent to judge of the claims of the applicants, small sums of money for the purposes of charity, as well as to expend a sum such as the lunatic was accustomed to do for the support of religious institutions. But the committee may not expend sums for charity or benevolent purposes other than had been the habit of the lunatic. The same rule is held in *Matter of Willoughby*, 11 Paige, 257, and that it is proper to allow provisions for the near relatives of the lunatic who are in need of such assistance, and a matter of course to make such provisions for his children. The court in all these matters acts for the lunatic, in reference to the lunatic, as it supposes he would have acted if he had been of sound mind. The court has the same power over habitual drunkards as over a lunatic. *Ex parte Lynch*, 5 Paige, 120.

The basis of this title is chapter 444, Laws of 1874, with additions by way of regulating the practice. Previous to the codification the practice was uncertain, and must be sought for, as is said by the codifiers, in the adjudicated cases and books of practice, and constituted a voluminous and intricate system. They further say that they "have carefully endeavored to avoid inserting statutory restrictions upon the courts, tending to deprive them of any part of the large discretion now resting in them, which it is necessary to preserve for the benefit of the unfortunate individuals to whom this title applies." A change is made in the form of procedure by authorizing a trial by jury at a Trial Term of the court instead of by a sheriff's jury.

The English procedure with reference to a commission in lunacy is discussed somewhat in *Re Brown*, 1 Abb. Pr. 108 (109), and is more fully considered in *Hughes v. Jones*, 116 N. Y. 67, where it

is said that for nearly a century the English practice was followed. Vann, J., in that case said (p. 77): "The primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists so that the public, through the courts, can take control."

ARTICLE II.

APPLICATION FOR COMMITTEE. §§ 2322-2324.

§ 2322. *Committee may be appointed, 393.*

§ 2323. *Application for committee; by whom made, 393.*

§ 2323a. *Application when incompetent person is in a State institution, 393.*

§ 2323b. *Costs of proceeding, 394.*

§ 2324. *Duty of certain officers to apply, 394.*

§ 2322. Committee may be appointed.

The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

§ 2323. Application for committee; by whom made.

An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section, where the application is made to the Supreme Court, the petition must be presented at a Special Term held within the judicial district, or to a justice of said court within such judicial district at chambers where the person alleged to be incompetent resides or if he is not a resident of the state, or the place of his residence cannot be ascertained, where some of his property is situated, or the State institution is situated of which he is an inmate.

§ 2323a. Application when incompetent person is in a state institution; petition, by whom made; contents and proceedings upon presentation thereof.

Where an incompetent person has been committed to a state institution in any manner provided by law, and is an inmate thereof, the petition may be presented on behalf of the state by a state officer having special jurisdiction over the institution where the incompetent person is confined or the superintendent or acting superintendent of said institution; the petition must be in writing and verified by the affidavit of the petitioner or his attorney, to the effect that the matters therein stated are true to the best of his information or belief; it must show that the person for whose person or property, or both, a committee is asked has been legally committed to a state institution over which the petitioner has special jurisdiction, or of which he is superintendent or acting superintendent, and is at the time an inmate thereof; it must also state the institution in which he is an inmate, the date of his admission, his last known place of residence, the name and residence of the husband or wife, if any, of such person, and if there be none, the name and residence of the next of kin of such person living in this state so far as known to the petitioner; the nature, extent and income of his property, so far as the same is known to the petitioner, or can with reasonable diligence be ascertained by him. The petition may be presented to the supreme court at any special term thereof, held either in the judicial district in which such incompetent

person last resided, or in the district in which the state institution in which he is committed is situated, or to a justice of the supreme court at chambers within such judicial district, or to the county court of the county in which the incompetent person resided at the time of such commitment, or of the county in which said institution is situated. Notice of the presentation of such petition shall be personally given to such person, and also to the husband or wife, if any, or if none to the next of kin named in the petition and to the officer in charge of the institution in which such person is an inmate. Upon the presentation of such petition, and proof of the service of such notice, the court or justice may, if satisfied of the truth of the facts required to be stated in such petition, immediately appoint a committee of the person or property, or both, of such incompetent person or may require any further proof which it or he may deem necessary before making such appointment.

§ 2323b. Costs of proceeding.

Upon the presentation of a petition and the appointment of a committee, as provided in section two thousand three hundred and twenty-three (a), the court or justice may award costs of the proceeding not exceeding twenty-five dollars, in addition to necessary disbursements, to the petitioner, payable from the estate of the incompetent person, and upon denial of an application to set the same aside, costs as of a motion.

§ 2324. Duty of certain officers to apply.

Where the incompetent person has property which may be endangered in consequence of his incompetency, and no relative or other person applies for the appointment of a committee of his property, the overseer or superintendent of the poor of the town, district, county, or city in which he resides, or, where there is no such officer, the officer or officers performing corresponding functions under another official title must apply to the proper court for the appointment of such a committee. The expenses of conducting the proceedings thereupon must be audited and allowed in the same manner as other official expenses of those officers are audited and allowed.

It is said in *Hughes v. Jones*, 116 N. Y. 74: "Any one, even a stranger, can petition for a commission to examine as to the sanity of another person within the jurisdiction of the court. While this is now provided by statute, it was also the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed lunatic."

By virtue of the statute any person, even a stranger, may present a petition for the issuance of a commission to inquire into the mental condition of an alleged incompetent, and hence a distant relative may present such petition, although not a resident of this State.

In order to justify the issuance of such commission two things must presumptively appear to the satisfaction of the court: First, that the person proceeded against is incompetent; and, secondly, that a committee ought in the exercise of a sound discretion to be appointed. Incompetency alone is insufficient, for the situation may be such that no committee is necessary.

The court is required to exercise a "sound" discretion, which

means that special care must be exercised, as a citizen may be deprived not only of possession of his property, but of his personal liberty. *Matter of Burke*, 125 App. Div. 889, 110 Supp. 1104; *dism'd*, 194 N. Y. 541.

The Supreme Court will take jurisdiction on the petition of the nephew of an alleged lunatic accompanied by affidavits of the mother and sister of the alleged lunatic, if not upon the petition of the nephew alone. *Matter of Chapman*, 43 App. Div. 231, 59 Supp. 1025; *rev'd*, 162 N. Y. 456.

In *Matter of Bischoff*, 80 App. Div. 326, it was held that the fact that the petition for the appointment of a committee of an alleged incompetent was not presented in a judicial district in which the alleged incompetent resides, was an irregularity which renders the proceedings invalid, citing *Matter of Porter*, 34 App. Div. 147. In the latter case it was held that while the proceeding was irregular it was not void.

A proceeding to have a person declared a lunatic, and his property and person put in the charge of a committee, has to be had in the judicial district in which such person resides. *Matter of Andrews*, 129 App. Div. 586, 114 Supp. 251.

A committee of an alleged incompetent resident of New York can be appointed only after the issuing of a commission and the determination of a jury, as provided by Code, section 2327, except where the application is made on behalf of the State authorities, and the incompetent is in the State hospital, as provided by section 2323a. *Matter of Bergman*, 110 App. Div. 588, 97 Supp. 346; *Gaffney v. Brinnier*, 110 App. Div. 588, 97 Supp. 346.

Under section 2323a the court has power, upon application, to make an order correctly spelling the name of such incompetent. *Sporza v. German Savings Bank*, 192 N. Y. 8, *aff'g* 109 App. Div. 172, 104 Supp. 260.

An incompetent person who has been lawfully committed to a State hospital for the insane under the provisions of the Insanity Law becomes a ward of the State and also of the Supreme Court, which has the power from time to time to inquire as to the continuance of the insanity, and also to take in charge the care and preservation of the incompetent's property. *Sporza v. German Savings Bank*, 192 N. Y. 8, *aff'g* 119 App. Div. 172, 104 Supp. 260.

Section 2323a *et seq.* of the Code of Civil Procedure, authorizing the appointment of a committee of an alleged incompetent person who has been committed to a State institution in any manner pro-

vided by law, to enable the State to secure reimbursement for his maintenance, without providing for a new investigation of the question of his competency, are not unconstitutional in that they permit the alleged incompetent to be deprived of his liberty or property "without due process of law." *Matter of Walker*, 57 App. Div. 1, 67 Supp. 647.

Where, in a proceeding under section 2323a, providing for the appointment of a committee of the estate of an inmate of the State hospital for the insane upon the petition of a State officer, the court appoints such a committee, a contention by such committee that the provision is violative of the Federal Constitution cannot be sustained where the incompetent has been duly committed in accordance with the provisions of the statute upon an order of the court; nor can the contention be sustained that the provision of the Code in question is violative of the State Constitution. *Sporza v. German Savings Bank*, 192 N. Y. 8, aff'g 119 App. Div. 172, 104 Supp. 260.

Code, section 2323a, providing that where an incompetent person has been committed to a State institution and is an inmate thereof, a committee of his estate may be appointed, does not authorize the appointment of a committee for the estate of a convict, sane when convicted, who has been transferred to the State hospital for insane convicts upon the certificate of the physicians of the prison, but without a formal determination as to the convict's incompetency. *Trust Co. of America v. State Safe Deposit Co.*, 109 App. Div. 665, 96 Supp. 585; aff'd, 187 N. Y. 178.

ARTICLE III.

PETITION AND PROCEEDINGS THEREON. §§ 2325, 2326, 2327, 2328.

Subd. 1. The petition and notice of presentation, 396.

§ 2325. *Contents, etc., of petition; proceedings upon presentation thereof*, 396.

§ 2326. *When foreign committee may be appointed*, 397.

Subd. 2. The commission and contents, 407.

§ 2327. *Order for commission, or for trial by jury in courts*, 407.

§ 2328. *Contents of commission*, 408.

Subd. 1. The Petition and Notice of Presentation. §§ 2325, 2326.

§ 2325. *Contents, etc., of petition; proceedings upon presentation thereof.*

The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him, and also the probable value of the property possessed and owned by the alleged incompetent person, and what

property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more relatives of the person alleged to be incompetent, or to an officer specified in the last section. Where notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

§ 2326. When foreign committee may be appointed.

Where the person alleged to be incompetent resides without the State, and a committee, curator, or guardian of his property, by whatever name such officer may be designated, has been duly appointed pursuant to the laws of any other State, territory, or country where he resides, the court may, in its discretion, make an order appointing the foreign committee, curator, or guardian, the committee of all or of a particular portion of the property of the incompetent person, within the State, on his giving such security for the discharge of his trust as the court thinks proper.

It is not necessary to accompany the petition with the affidavit of a physician, to give the court power to appoint a commission, although in cases of lunacy it is usual to do so. *Matter of Zimmer*, 15 Hun, 214. But a committee cannot be appointed on the certificates of physicians; there must be an inquisition. *Matter of Corlies*, 1 Law Bull. 59.

In proceedings instituted for the purpose of inquiring into the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging incompetency, by reason of unsoundness of mind to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate, and a commission thereupon issues. *Matter of Church*, 64 How. 393.

In response to the petition, no assistance should be refused from those entitled to be heard which will aid the court in exercising its sound discretion. *Matter of Burke*, 125 App. Div. 889, 110 Supp. 1004; *dism'd*, 194 N. Y. 541.

It is unusual that affidavits and proof on behalf of the person alleged to be incompetent should be used in determining the question of such incompetency upon motion. Such question should be tried either before a sheriff's jury or before a jury at a Trial Term of the court. The court in this case says: "It is unnecessary, nor would it be proper, to determine that upon this record there is exhibited a case of incompetence such as would justify the appointment of a commissioner . . . but we think it the duty of the court, if it presumably appears from the petition and the proof accompanying it,

that the person proceeded against is a person incompetent to manage himself or his affairs, to order an investigation as to whether or not such incompetency exists; and that this was a case which required an investigation before a tribunal provided by law for that purpose." *Matter of Beach*, 23 App. Div. 412.

Where the petition and accompanying affidavits in a proceeding for the appointment of a committee of the estate of an alleged incompetent allege that she is of the age of ninety-two years, is weak in mind and body, and so far deprived of reason and understanding as to be unfit to care for herself or manage her affairs, and that her eyesight has become impaired, her memory is not good, and she is very easily persuaded, it is the duty of the County Court of the county in which she resides to issue a commission to inquire into the question of her imbecility. *Matter of Roberts*, 64 Misc. 118, 118 Supp. 377.

A petition and accompanying affidavits, in a proceeding for the appointment of a committee for the person and estate of an alleged incompetent, which alleged that the alleged incompetent is incompetent to manage himself and his affairs, and is of weak mind and easily worked upon by any persons who obtain a controlling influence over him, are sufficient under the statute (*Code Civ. Pro.*, §§ 340, 2327) to call into exercise the jurisdiction of the County Court of the county in which the alleged incompetent resides, and to justify the inquiry through a commission. *Matter of Clark*, 175 N. Y. 139.

It seems that under section 2325 a petition is defective if the matters alleged therein, relating to the mental condition of the alleged incompetent, are averred upon information and belief without any statement as to the source of information on which the belief is predicated. *Matter of Bischoff*, 80 App. Div. 326, 80 Supp. 917.

Where the petition and accompanying affidavits in proceedings for the appointment of a committee of an alleged incompetent contain allegations which, if true, would presumptively require the appointment of a commission, the court is obliged to send the matter to a jury or commission for a hearing and cannot try the matter in the first instance upon affidavits, although upon all the affidavits for and against, the court be of opinion that if such were the evidence given upon the hearing the proceedings should be dismissed or the finding of incompetency set aside. *Matter of Milchsack*, 43 Misc. 586, 89 Supp. 524.

As a physician is prohibited by section 834, Code of Civil Procedure, from disclosing professional information, he cannot make an

affidavit in support of an application for the appointment of a committee of a lunatic or habitual drunkard. It seems that although the petition contains a positive allegation that the person is an habitual drunkard, this proof is not sufficient but further proof must appear by affidavit.

Although the petition contains a positive allegation that the person against whom the proceeding is instituted is an habitual drunkard, this will not sustain an order for a commission, but the proof must appear by affidavit. Still further, an affidavit relating to one occasion does not suffice to establish habitual drunkenness in support of a petition under section 2325. *Matter of Hoyt*, 20 Abb. N. C. 162.

Where every fact in a petition is stated positively as of the petitioner's own knowledge, a verification is sufficient which states that the petition is true of the petitioner's own knowledge except as to facts therein stated to be alleged on information and belief, etc.

An affidavit independent of such petition expressly stating that the case is one of those specified in the title of the Code embracing section 2326 is not necessary to give the court jurisdiction, if the facts appear in the verified petition. *Matter of Curtiss*, 134 App. Div. 547, 119 Supp. 556; aff'd, 197 N. Y. 583.

A proceeding by the foreign committee of a non-resident incompetent for appointment as committee of property in this State must be commenced by a petition under section 2325 of the Code of Civil Procedure.

When so commenced two courses are open: if the incompetent be a non-resident and has been so adjudged in the State of his domicile, our court may in its discretion follow the procedure in section 2326 of the Code of Civil Procedure. If the incompetent be not a non-resident, or, being a non-resident, has not been so adjudged in the State of his domicile, or if the court in its discretion decline to proceed under section 2326 of the Code, proceedings must be had under section 2327 and an inquisition issue. But if an order of appointment has been made under section 2326 the procedure prescribed in section 2327 is not applicable. *Matter of Curtiss*, 134 App. Div. 547, 119 Supp. 556; aff'd, 197 N. Y. 583.

Where the petition for the appointment of a committee for an alleged incompetent showed that the person was insane, and was a resident of New York, and that the so-called guardian who had been appointed for her in another State was not legally such, the New York court had no jurisdiction to appoint him as ancillary committee

of such person's person or estate under Code, section 2326, providing that where a committee has been appointed for a non-resident incompetent the court may appoint such person a committee in New York to manage the incompetent's property within that State. *Matter of Bergmann*, 110 App. Div. 588, 97 Supp. 346; *Gaffney v. Brinnier*, 110 App. Div. 588, 97 Supp. 346.

Proceeding for the appointment of a committee of the person and property of an incompetent who, having transferred all his real property to his wife, was supported by her in a private asylum. Moving papers and answering affidavits examined, and *held*, that the proceeding instituted by a son of the incompetent was not brought in good faith but with a desire to embarrass his mother and to obtain evidence upon which the conveyance to her might be attacked in an action by the committee. *Matter of Vail*, 137 App. Div. 220, 121 Supp. 958; *dism'd*, 199 N. Y. 560.

An application for the appointment of a committee of an incompetent upon a petition served upon the incompetent was objected to as not noticed for the first day of the term, and an order to show cause returnable next day issued for the purpose of bringing on the hearing, *held*, that it was not necessary to serve the order upon the incompetent in person. *Matter of Maginn*, 100 App. Div. 230, 91 Supp. 814.

The jurisdiction of the County Court in lunacy proceedings does not depend upon notice given to all of the next of kin, and in the absence of any suggestion of injury to the lunatic, because of non-service upon one of them, an objection taken thereto should be disregarded. *Matter of Cook*, 25 St. Rep. 64, 6 Supp. 720.

Where there is a dispute in regard to the habits and condition of a person alleged to be incompetent because of habitual intoxication, it is the safer course that notice of the institution of a proceeding to have him declared incompetent be served upon him to the end that he may have an opportunity to be heard at every step of the proceeding. *Matter of Coffin*, 41 Misc. 131.

The failure of the court to require notice of an application for the appointment of a committee for a lunatic to be given, where sufficient reasons for dispensing therewith are not set forth in the moving affidavit or the petition, does not deprive it of jurisdiction, but is a simple irregularity which may be cured or disregarded. It is sufficient, if, on a motion made by an alleged lunatic to set aside the order appointing the commission, all the parties interested have an opportunity to be heard. *Matter of Demelt*, 27 Hun, 480; *Matter*

of *Rogers*, 9 Abb. N. C. 141. The alleged lunatic, except in case of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and he ought to be produced before the jury for their inspection and examination. *Ex parte Russell*, 1 Barb. Ch. 38; *Ex parte Tracy*, 1 Paige, 580. After the return of an inquisition finding sufficient facts, it is too late to question the allegations of the petition. *Ex parte Zimmer*, 15 Hun, 214.

As section 2325 requires notice of the presentation of the petition to be given to the husband or wife of the person proceeded against, or to one or more relatives of the person, etc., it was held, that where the sheriff's jury found a person an habitual drunkard, and a commission was issued, that all the proceedings except the filing of the first petition should be set aside where notice of the proceedings was not served, and where the person was not represented by counsel. Although her father and brother were notified to attend before the jury, the proceedings were set aside, with leave to the petitioner to make further application on the petition. *In re Bennett*, 5 Supp. 373. But it has been held that section 2325 does not require notice to be given to the relative of an alleged incompetent person when the application for the appointment of the committee is made by the husband or wife. *Matter of Parke*, 15 Misc. 662.

Before the court may proceed in lunacy proceedings, it is requisite that personal and written notice be served upon the alleged lunatic, in addition to the notice to relatives and others, required by the Code of Civil Procedure, section 2325, unless upon a clear case showing it to be improper or unsafe to give such notice, an order has been made by the court dispensing with it.

Where, however, on appeal by an alleged lunatic from an order denying a motion to vacate a commission and proceedings in lunacy, which motion was based upon the ground of failure to give such notice, it appeared that the notice of motion was in the alternative demanding that the proceedings be vacated, or that an issue be awarded to try the fact of lunacy, and the Special Term, while refusing to vacate, made an order permitting the alleged lunatic to traverse the allegations in the petition and directing a trial of the issues by jury before the commissioners appointed in the lunacy proceedings and where it appeared that upon a prior motion by the alleged lunatic to supersede the commission, on the ground that he was then of sound mind, the question as to his sanity, at the time the proceedings were instituted and at the time of the motion, was fully

presented by the affidavits, and the motion was denied, *held*, that said order should be affirmed on these grounds: First, in the proceedings instituted by the alleged lunatic, there was full opportunity given to present and litigate the question of his sanity, and it was so litigated and decided adversely to him without his raising any question of jurisdiction; second, the alternative relief asked for in the motion or more favorable relief had been awarded; third, said order placed the appellant in the same position as upon an original hearing upon the original petition; fourth, it was in the discretion of the court pending the traverse to let the inquisition and proceedings stand until the termination of the inquiry. *Matter of Blewitt*, 131 N. Y. 541.

It is not essential in proceedings for the appointment of a committee of an idiot that the alleged idiot should have notice of the application for a commission. If any notice is necessary where the proceedings are instituted by a parent of the person proceeded against, as to which, *quære*, notice of the time and place for the execution of the writ is sufficient to give the court jurisdiction, and while the alleged idiot should have notice of the motion to confirm the findings of the jury, and for the appointment of a committee, the failure to give such notice does not render the proceedings void. *Gridley v. College of St. Francis Xavier*, 137 N. Y. 327.

While failure to give personal notice of the presentation of the petition to have a person declared incompetent, and to afford him opportunity to traverse the allegations therein, may not be fatal to the proceedings in which his incompetency was found, it affords ground for granting a request that he be permitted to traverse the allegations and be heard upon the appointment of commissioners and before a newly summoned jury. *Matter of Sweeney*, 81 App. Div. 231, 81 Supp. 47.

Where there is not the slightest proof that an alleged incompetent person is possessed of or entitled to any property of any kind that a committee appointed by the court could take possession of, manage, or apply to his maintenance, a petition for the appointment of a committee of his property will be denied.

Where it appears that the alleged incompetent person is confined upon a criminal charge, the court will neither appoint a committee of his person nor a commission in lunacy. *Matter of Rabinovitch*, 70 Misc. 288.

Petition.

COUNTY COURT — ONTARIO COUNTY.

IN THE MATTER OF THE APPLICATION FOR THE
APPOINTMENT OF A COMMITTEE OF THE PER-
SON AND PROPERTY OF EUGENE P. CLARK,
AN ALLEGED INCOMPETENT PERSON.

175 N. Y. 139.

To the County Court of Ontario County:

The petition of Howland P. Wells respectfully shows:

That your petitioner is the brother-in-law of the above-named Eugene P. Clark, and resides at Palmyra, N. Y.

That the said Clark is of the age of about forty-nine years and resides in the town of Manchester, N. Y. That for many years prior to July 27, 1898, the said Clark resided on the premises, a part of which he now occupies, with his mother, who cared for him and transacted his business for him; that the mother of said Clark died on or about the 27th day of July, 1898, since which time said Clark has resided on said premises with one Philip Powers, who works the land and occupies a part of the house. That the said Clark is incompetent to manage himself or his affairs and is of weak mind and easily worked upon by any persons who obtain a controlling influence over him. That the said Clark is possessed of personal property in the sum of about \$1,000, and is seized of real estate worth about \$2,800, which is described as follows: Situate partly in the town of Farmington and partly in the town of Manchester, and bounded as follows, viz.: (Insert brief description.) That the said Eugene P. Clark has never been married and that his heirs-at-law and next of kin and their places of residence are as follows, to wit:

Mary E. Payne, residing at Farmington, N. Y.; A. Jeanette Wells, wife of your petitioner, residing at Palmyra, N. Y., sisters of said Clark, and Truman S. Clark, a half-brother, whose last known place of residence was Bodie, Cal., but whether now living or dead your petitioner knoweth not. That all of said persons are of full age. That the said Eugene P. Clark has never had a committee appointed of his person and estate.

WHEREFORE, Your petitioner prays that a committee may be appointed of the person and estate of the said Eugene P. Clark, and that a commission may issue out of and under the seal of this court to inquire as to the competency of the said Clark.

(Verification.)

HOWLAND P. WELLS,

(Affidavits confirming and showing in detail facts corroborative of the allegations of the petition.)

Petition.

To the Supreme Court of the State of New York:

The petition of Eveline O. Littell of No. 73 Centre street, West Haven, Conn., respectfully shows:

That she is a niece of Margaret Gray, formerly of Glenmont, town of Bethlehem, Albany county, N. Y., who is incompetent to manage herself or her property and affairs by reason and in consequence of acute melancholia and senile dementia.

That said Margaret Gray attained her eighty-fifth birthday in August last, and is in feeble physical condition.

That she resided at Glenmont, in said town of Bethlehem, for upward of thirty-five years; in conjunction with her sister, Mary Gray, who died at said place on the 26th day of April last past, was in the eighty-seventh year of her age.

That the said Margaret Gray is possessed of personal property of the value, as your petitioner verily believes, of upward of \$10,000, or such was the value of her personal estate within a year last past, consisting of moneys in bank, bonds and other securities and personal property.

That until on or about the 11th day of May last past she was the owner in fee of that farm and real property which she occupied for so many years consisting of ten acres which she purchased in or about the year 1894, paying therefor the sum of \$4,800 or thereabouts, and which on said 11th day of May was of substantially that value.

That on said 11th day of May, 1906, said Margaret Gray conveyed said real property to Emeline Wheeler and Rosanna Locke, the consideration expressed in said deed being the sum of \$500, together with the agreement on the part of the grantees to take care of the said Margaret Gray during the rest of her life, which deed was recorded in the Albany county clerk's office in book 543 of deeds, page 376.

That the said Margaret Gray is a single person, never having been married; that her father and mother are both dead, and her only heirs-at-law and next-of-kin are and reside as follows:

(Here insert names, relationship and addresses.)

All of whom are of full age and sound mind. (If not so state.)

That the said Margaret Gray for upward of a year last past constantly labored under delusions whereby she repeatedly asserted that all her family, friends or relatives had committed suicide, or would commit suicide, and that some of them were about to chloroform her for the purpose of killing her; on another occasion she repeatedly asserted that she was to be tried for manslaughter and sure to be convicted; and again that certain of her relatives who have been incarcerated in prison are now out on bail, all of which are a delusion and due solely to the mental unbalance of the mind of the said Margaret Gray.

And your petitioner further alleges that heretofore and on or about the 23d of June, 1906, the said Margaret Gray was removed from said home in Glenmont to the Albany Hospital where she ever since has been and is now confined in Pavilion F as a lunatic, incapable of managing herself or her affairs or property.

WHEREFORE, Your petitioner prays that a committee of the person and property of the said Margaret Gray be appointed, and that a commission issue out of and under the seal of this court to inquire into the apparent lunacy of the said Margaret Gray, and for such other and further order or relief in the premises as to the court seems meet and proper.

Dated, *January* 18, 1907.
(Verification.)

EVELINE O. LITTELL,
Petitioner.

Affidavit to Accompany Petition.

STATE OF NEW YORK, }
COUNTY OF SARATOGA, } ss.:

GEORGE W. MARCELLUS, being duly sworn, says that he resides at Ballston Spa, N. Y., and is a nephew of Margaret Gray, who for many

years resided at Glenmont, Albany county, N. Y., and up to or about the 20th day of June, 1906, when she was removed from her home at Glenmont to the Albany Hospital, where in Pavilion F, she has been confined ever since.

Deponent further says that he resided with the said Margaret Gray until on or about the said 20th day of June, 1906, since the spring of 1893; that the said Margaret Gray for upward of nine months last past has been laboring under delusions whereby she has repeatedly asserted that her family, friends and relations had committed or were about to commit suicide, and on other occasions that she was to be tried for manslaughter and electrocuted, and on other occasions that certain of her relatives who had been incarcerated in prison were out on bail, all of which were delusions, and due solely to the mental unbalance of mind of the said Margaret Gray; that in the opinion of your deponent during such period of time and at the present time, said Margaret Gray is afflicted with what deponent would call nervous insanity, at times very much insane, that in the opinion of deponent she is mentally incapable of caring for herself, or her property or her estate.

(Verification.)

GEORGE W. MARCELLUS.

Affidavit of Physician to Accompany Petition.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

J. MONTGOMERY MOSHER, being duly sworn, says that he is, and for upward of fifteen years has been, a practicing physician, residing in the city of Albany, giving special attention the greater part of that time to mental diseases.

That he is well acquainted with Margaret Gray, who is now, and for seven months last past, has been confined in Pavilion F of the Albany Hospital.

That during that time deponent has observed the said condition of said Margaret Gray, and he is of the opinion that the said Margaret Gray during that period of time, and now is, suffering from senile dementia, complicated by acute melancholia.

That in the opinion of deponent the said Margaret Gray is now, and for such period aforesaid, has been incapable of caring for herself, or her property or estate.

That in the opinion of deponent a committee of her person and estate should be appointed to properly care for her affairs and property.

That in the opinion of deponent her condition is such that while she has recovered from the acute melancholia, there is no reasonable hope of her recovering her mental equipoise.

(Verification.)

J. MONTGOMERY MOSHER.

Order as to Notice of Presentation of Petition.

(Title.)

Upon the within petition and affidavits, let notice of the presentation of the same and of the application thereupon to this court for the issuance of a commission *de lunatico inquirendo* to inquire into the alleged incompetency of said Margaret Gray be given to said Margaret Gray and to said George W. Marcellus, her nephew, heir-at-law and next of kin, and the superintendent or person in charge of the Albany Hospital by service of a copy of said petition, affidavits, notice of

presentation of said petition and of this order upon said Margaret Gray and said George W. Marcellus and said superintendent or person in charge of the Albany Hospital, personally, on or before January —, 1907.

Dated, Albany, N. Y., *January 23, 1907.*

ALDEN CHESTER,
Justice Supreme Court.

(Title.) **Notice of Presentation of Petition.**

Take notice that pursuant to the order of the Hon. Alden Chester, a justice of the Supreme Court, therefore notice is hereby given that the petition and affidavits of which the within are copies, with which you are herewith duly served, will be presented to the Special Term of the Supreme Court, to be held at the City Hall in the city of Albany, N. Y., on the 26th day of January, 1907, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard and an application then and there made that the prayer of the said petition be granted.

Dated, Albany, N. Y., *January 23, 1907.*

Yours, &c., MEAD & HATT,
Attorneys for said petitioners.

To MARGARET GRAY, alleged incompetent person.

To GEORGE W. MARCELLUS, nephew, heir-at-law and next of kin of said Margaret Gray.

To the Superintendent or person in charge of the Albany Hospital.

Precedent for Petition by Superintendent of a State Hospital for the Insane to Have a Committee Appointed for the Estate of an Insane Person Duly Committed to Such State Hospital (Sporza v. German Savings Bank, 192 N. Y. 8).

Petition.

SUPREME COURT — COUNTY OF NEW YORK, FIRST JUDICIAL DISTRICT.

IN THE MATTER OF THE APPOINTMENT OF A
COMMITTEE OF THE ESTATE OF IDA JETTA,
AN ALLEGED INCOMPETENT PERSON AND AN
INMATE OF THE MANHATTAN STATE HOS-
PITAL.

Sporza v. German Savings Bank,
192 N. Y. 8.

To the Supreme Court, First District, State of New York:

The petition of Dr. William Mabon respectfully shows that he is superintendent of the Manhattan State Hospital, at Ward's Island, New York, and that he is authorized to make application for the appointment of a committee of the estate of the above-named Ida Jetta, under the provisions of sections 2323 and 2323a of the Code of Civil Procedure.

Your petition further states upon information and belief that the above-named Ida Jetta is an incompetent person and has been lawfully committed to the Manhattan State Hospital, at Ward's Island, State of New York, in the manner provided by the State Insanity Law, as more fully appears by the petition, order and certificate made for that purpose and now on file in the office of the Manhattan State Hospital.

Your petitioner further states that said Ida Jetta was committed to said hospital on or about the 16th day of April, 1906, and is now an inmate thereof, as appears by the transcript from the records of said hospital, which is hereto annexed and forms a part of this petition.

Your petitioner further states upon information and belief that the

last known place of residence of the said Ida Jetta was the borough of Manhattan, in the county of New York and State of New York; and the names and residences of the husband of said Ida Jetta or next of kin, living in the State of New York, so far as known to your petitioner, are as follows:

Name	Relationship to Patient	Residence
FRANK SPORZA	Husband.	412 East 5th St., New York.

Your petitioner further states, upon information and belief, that the nature, extent and income of the property of the said Ida Jetta, so far as known to your petitioner, or can, with reasonable diligence be ascertained by him, are as follows: Patient has one thousand two hundred and sixty-three dollars and thirty-six cents (\$1,263.36) in the German Savings Bank, as evidenced by bank-book No. 369,363, and that said Ida Jetta has no other proeprty, real or personal.

Your petitioner further states that said Ida Jetta is now maintained and supported by the people of the State of New York, in said hospital, as a public charge, and no previous application has been made by your petitioner, or any person in behalf of the State of New York for the appointment of a committee of her estate.

Your petitioner hereby makes application for the appointment of a committee of the estate of said Ida Jetta, for the purpose of having her estate and property, so far as the same shall be required for that purpose, applied for her maintenance and support, in whole or in part, in a State institution and for such other purposes as may be directed and ordered by any court of competent jurisdiction.

And thus your petitioner will ever pray.

WILLIAM MABON,

Dated, Ward's Island, New York, this 27th day of *April*, 1906.

(Add verification.)

Subd. 2. The Commission and Contents. §§ 2327, 2328.

§ 2327. Order for commission, or for trial by jury in courts.

Unless an order is made as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the position and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or

2. That the question of fact, arising from the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury, at a trial term of the court.

3. When it satisfactorily appears from the petition and accompanying affidavits that any person or persons having acquired from the alleged incompetent person, real or personal property during the time of such alleged incompetency, without adequate consideration, the court may issue an order, with or without security, restraining such person or persons from selling, assigning, disposing of, or encumbering said property, or confessing judgment which shall become a lien upon said property, during the pendency of the proceeding for the appointment of a committee, and said order may in the discretion of the court be continued for ten days after the appointment of such committee. Notice of

the execution of the commission shall be given to the person or persons enjoined in such manner as the court may direct.

§ 2328. Contents of commission.

The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

An application to the Supreme Court to inquire into the present mental condition of one judicially declared incompetent must be made in the judicial district where the incompetent resided at the time she was adjudged insane.

Such motion should be made in the original proceeding, and not entitled as a new proceeding. *Matter of Andrews*, 129 App. Div. 586.

The court should not hear the merits on affidavits, but must send the matter to a commission or a jury, and this, although upon all the affidavits on both sides, the court be of the opinion that, if such were the evidence given upon the proceeding, it should be dismissed, or the finding of incompetency be set aside. *Matter of Milchsack*, 43 Misc. 586, 89 Supp. 524.

In such proceeding the Special Term is not confined to matters set forth in the petition and affidavits in reply, but should determine the question of presumptive incompetency from all the papers before it at the time of the hearing, including those urged against the application as well as those in favor of it.

Where notice of such proceeding was given to the incompetent as directed by the court, but her son, the petitioner, took the notice, refused to deliver it to the attorney of the alleged incompetent, and prevented him from consulting with her, it is irregular for the Special Term, although it has jurisdiction, to order the issues to be tried before a jury, as the incompetent has not had an unrestricted opportunity to present her defense. *Matter of Fox*, 138 App. Div. 43.

Sections 2327 to 2336 of the Code of Civil Procedure, which contain provisions for the issuing of a commission to inquire as to the incompetency of persons, and prescribe the practice therefor, were not intended to apply to an application to supersede a committee of a person adjudged thereby to be incompetent. Such an application is provided for by section 2343. *Matter of Curtiss*, 199 N. Y. 36, aff'd 137 App. Div. 584, 122 Supp. 468.

(Caption.) **Order Appointing Commission.**
COUNTY COURT — ONTARIO COUNTY.

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A COMMITTEE OF THE PERSON AND ESTATE OF EUGENE P. CLARK, AN ALLEGED INCOMPETENT.	} 175 N. Y. 139.
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Upon reading and filing the petition of Howland P. Wells, dated July 22, 1899, in the above-entitled matter, praying that a committee of the person and property of the above named Eugene P. Clark, together with the affidavits of Collins Payne and Mary E. Payne attached thereto, verified July 22, 1899, by which it appears presumptively to the satisfaction of the court that the case is one of those specified in title sixth of chapter 17 of the Code of Civil Procedure, and that a committee ought, in the exercise of sound discretion, to be appointed for the person and estate of the said Eugene P. Clark, alleged to be incompetent to manage himself and his affairs; and, after hearing M. Hopkins, Esq., of counsel for the petitioner, no one opposed, it is hereby ordered that a commission issue in the above-entitled matter to James A. Robson, Esq., directing the said commissioner to cause the sheriff of the county of Ontario to procure a jury, and that he inquire by the said jury into the matters set forth in said petition and also into the value of the real and personal property of the said Eugene P. Clark, and the amount of his income and whether said Eugene P. Clark has alienated any lands or tenements, being so incompetent; and if so, what lands and tenements, and to what person or persons, when, where and in what manner, and the amount received therefor, and the value of the lands and tenements remaining to said Eugene P. Clark, and the value of the rents, issues and profits thereof,*per year.

And it is further ordered that, upon the execution of the said commission, the persons having charge of the said Eugene P. Clark, or in whose custody he shall be, do produce him before the said commissioner and jury, to be inspected and examined by them whenever required to do so by the said commissioner, and notice of the hearing before the said commissioner and jury to be given to said Eugene P. Clark, personally, at least eight days before said hearing. And it is further ordered that testimony respecting anything said or done by the said Eugene P. Clark or his demeanor and state of mind, more than two years before such hearing before such commissioner and jury, shall be received as proof of the incompetency of the said Eugene P. Clark.

WALTER H. KNAPP,
County Judge of Ontario County.

Precept to Commissioner.

The People of the State of New York to James A. Robson, of Canandaigua, in the county of Ontario, Greeting:

Know ye, that we have assigned to you to cause the sheriff of the county of Ontario to procure a jury and to inquire by the said jury into the matters set forth in the petition of Howland P. Wells, dated July 22, 1899, and also into the value of the real and personal property of Eugene P. Clark, of Manchester, N. Y., and the amount of his income, and whether the said Eugene P. Clark is incompetent to manage himself or his affairs, and, if so, after what manner and how, and whether the

said Eugene P. Clark, being so incompetent, has alienated any lands or tenements or not, and, if so, what lands or tenements, to what person or persons, when, where, in what manner and how; and what lands and tenements remain to him, and of what value the lands and tenements alienated by him, as well as by him retained, and how much the rents, issues and profits thereof are worth per year; and what is the value of his goods, chattels and personal estate; and who will be the nearest heirs of the said Eugene P. Clark in the event of his death, and of what age.

And, therefore, we command you that at a certain day and place, or at certain days and places, which you for that purpose shall appoint, you diligently make inquisition in the premises, and that you cause reasonable notice of the time and place by you appointed for that purpose, to be given to the said Eugene P. Clark, and that you send the inquisition, which you shall thereupon make, signed by you and by those persons by whom it shall be made, distinctly and plainly and without delay, to our Supreme Court, together with this writ.

Witness, Hon. Walter H. Knapp, county judge of Ontario
[L. S.] county, at Canandaigua, N. Y., the 24th day of July, 1899.

F. R. HOAG, Clerk.

HOPKINS & CONVERSE, Attorneys for Petitioner.

(Caption.) **Order Appointing Commission.**

SUPREME COURT — ALBANY COUNTY.

IN THE MATTER OF MARGARET GRAY, AN
ALLEGED INCOMPETENT PERSON.

On reading and filing the petition of Eveline O. Littell, verified on the 16th day of January, 1907, and the affidavits of George W. Marcellus and Dr. J. Montgomery Mosher, sworn to on the 19th day of January, 1907, and due proof of personal service thereof and of the order of Hon. Alden Chester, justice of the Supreme Court therefor, and the notice of the presentation of such petition upon said Margaret Gray alleged incompetent, and said George W. Marcellus and Simon Cox, superintendent of the Albany Hospital, on January 23, 1907.

After hearing Mead & Hatt, attorneys for the petitioner, and no one appearing in opposition; it is ordered that a commission, in the form of a writ *de lunatico inquirendo*, be issued out of and under the seal of this court, in the usual form, directed to Charles S. Stedman, Esq., counsellor-at-law, of the city and county of Albany, N. Y., to inquire by a jury of said county whether the said Margaret Gray is a lunatic and incapable of managing herself and her property, and that the sheriff of said county be instructed in said commission to summon a jury in the manner required by law.

It is further ordered that said commission be executed in the city and county of Albany, where the said Margaret Gray resides, and that previous notice of the time and place of such execution be given said Margaret Gray, and to the superintendent or person in charge of the Albany hospital, and to said George W. Marcellus at least five days before the date thereof, by personal service of such notice upon them respectively.

JOHN FRANEY, Clerk.

Precept to Commissioner.

The People of the State of New York to Charles S. Stedman, of the city and county of Albany, Greeting:

Know ye, that we have assigned to you to inquire, by the oath of good and lawful men of the county of Albany, by whom the truth of the matter may be better known, whether Margaret Gray, of the city and county of Albany, is a lunatic with or without lucid intervals, by reason of which infirmity she is incapable of governing herself or of managing her affairs or property, or properly caring for her lands, tenements, goods, and chattels, and if so, from what time such infirmity dates, and in what manner and how such infirmity has manifested itself, and whether, while in such condition, the said Margaret Gray has alienated any lands and tenements, and if so to what person or persons, when, where, and after what manner; and also what lands, tenements, goods, and chattels are yet remaining to her, and of what value the lands and tenements alienated by her are, as well as the value of the lands and tenements, goods and chattels by her maintained, and what the issues and profits thereof amount to by the year, and the value of all her real and personal estate, and who are the nearest heirs and next of kin of the said Margaret Gray, and who would be entitled to her estate in case of her death, and the age of each.

WHEREFORE, we command you that you cause the sheriff of the county of Albany to procure a jury, and that you inquire by the jury into the matters set forth in the petition in this proceeding, verified by Eveline O. Littell, the 18th day of January, 1907, and also that you inquire into the value of the real estate and personal property of the said Margaret Gray, and the amount of her income therefrom, and the other matters above stated.

And that you appoint such day and place, or days and places, for the purpose of holding such inquisition as may be convenient; and that you give at least five days' personal notice of the time and place of the execution of this commission to said Margaret Gray, and to George W. Marcellus, her nephew and next of kin, and to the superintendent or person in charge of the Albany Hospital; and that you report the inquisition which you shall thereupon make under the hands and seals of yourselves or a majority of you, together with those of the persons by whom it shall be made, distinctly and plainly, and without delay to our court, together with this writ.

Witness, Hon. George H. Fitts, justice of the Supreme Court,
[L. s.] at the City Hall, city of Albany, N. Y., this 26th day of
January, 1907.

GEORGE H. FITTS,
Justice Supreme Court.
JOHN FRANEY,
Clerk of Said Court.

MEAD & HATT,
Attorneys for Petitioner.

ARTICLE IV.**HEARING BEFORE COMMISSIONERS OR IN COURT. §§ 2329-2335.**

§ 2329. *Commissioners to be sworn; vacancies, how filled, 412.*

§ 2330. *Jury to be procured; proceedings thereupon, 412.*

§ 2331. *Proceedings upon hearing, 412.*

§ 2332. *Return of inquisition and commission, 412.*

§ 2333. *Expenses of commission, 412.*

§ 2334. *Proceedings upon trial by jury in court, 412.*

§ 2335. *Subject of inquiry in cases of lunacy, 413.*

§ 2329. Commissioners to be sworn; vacancies, how filled.

Each commissioner, before entering upon the execution of his duties, must subscribe and take, before one of the officers specified in § 842 of this act, and file with the clerk, an oath, faithfully, honestly, and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the State, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal, or resignation.

§ 2330. Jury to be procured; proceedings thereupon.

The commissioners, or a majority of them, must immediately issue a precept to the sheriff designated in the commission, requiring him to notify not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners at a specified time and place within the county, to make inquiry as commanded by the commission. The sheriff must notify the jurors accordingly, and must return the precept and the names of the persons notified to the commissioners at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt as where a juror, duly notified, fails to attend at a trial term of the court. The commissioners may require the sheriff to cause a talesman to attend in place of a juror notified and not attending, or who is excused or discharged; or they may adjourn the proceedings for the purpose of punishing the defaulting juror or compelling his attendance. But it is not necessary to cause any talesman to attend if at least twelve of the persons notified by the sheriff appear and are sworn.

§ 2331. Proceedings upon hearing.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court holding a trial term subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them and issue a new precept to the sheriff to procure another jury.

§ 2332. Return of inquisition and commission.

The inquisition must be signed by the jurors concurring therein and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners and filed with the clerk.

§ 2333. Expenses of commission.

The commissioners are entitled to such compensation for their services as the court directs. The jurors are entitled to the same compensation as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff, and jurors.

§ 2334. Proceeding upon trial by jury in court.

Where an order is made, directing the trial by a jury, at a trial term, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried;

which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner as it deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

§ 2335. Subject of inquiry in cases of lunacy.

Where the petitioner alleges that the person with respect to whom it prays for the appointment of a committee is incompetent by reason of lunacy, the inquiry with respect to his competency upon the execution of a commission, or the trial at a trial term, as prescribed in this title, must be confined to the question whether he is so incompetent at the time of the inquiry; and testimony respecting anything said or done by him, or his demeanor or state of mind more than two years before the hearing or trial, shall not be received as proof of lunacy, unless the court otherwise specially directs in the order granting the commission or directing the trial by jury.

The commissioners appointed in a lunacy proceeding cannot exercise any of the functions of their office without taking the prescribed oath.

The taking of an oath is a condition precedent to the right of the commissioners to perform the functions of their office. The oath is one of the safeguards provided by statute for the protection of the rights of the individual, and the Legislature, by prescribing the form, made the form of the essence of the act. That which the Legislature have directed the courts cannot declare immaterial. Where two commissioners took the prescribed oath and issued precept to the sheriff to summon the jury, and a third commissioner never took any oath and did not act with the commissioners, the commission was held to have no legal existence and want of jurisdiction may be asserted collaterally. *Matter of Bischoff*, 80 App. Div. 326, citing *Merritt v. Village of Portchester*, 71 N. Y. 309; *Stebbins v. Kay*, 123 N. Y. 31, 35; *Matter of Baker*, 173 N. Y. 249, 254.

(Title.) **Oath of Commissioner.**

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

Charles S. Stedman, being duly sworn, says, that he will faithfully honestly and impartially discharge the duty of commissioner in the above-entitled matter under the order made herein by the Supreme Court.

CHARLES S. STEDMAN.

(Title.) **Oath, Another Form.**

MONROE COUNTY, ss.:

John Vosburgh, Henry Pierce and Charles R. Mott, being each duly sworn, says, each for himself, that he will support the Constitution of the United States and the Constitution of the State of New York, and that he will faithfully, honestly and impartially discharge the trust committed to him as commissioner in the above-entitled matter under the order herein made by the Supreme Court.

Jurat.

Signatures.

Precept to Sheriff and Return by Sheriff.*To the Sheriff of the County of Albany, Greeting:*

WHEREAS, A commission has issued out of the Supreme Court to me, the undersigned, as commissioner to inquire as to whether Margaret Gray, of the city and county of Albany, N. Y., is an incompetent person incapable of caring for herself or of managing her property, or estate: Now, therefore, by virtue of such commission, bearing date the 26th of January, 1907, I require you to notify not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the Supreme Court, to appear before me, at the office of Mead & Hatt, 86 State street, Albany, N. Y., on the 4th day of February, 1907, at three o'clock in the afternoon, then and there to inquire on their oaths of the alleged incompetency of the said Margaret Gray, and of all such matters and things as shall be given in charge, by virtue of said commission; thereof, fail not at your peril.

Given under my hand and seal this 28th day of January, 1907.

CHARLES S. STEDMAN, [L. S.]
As Commissioner.

"The following-named jurors have been summoned to inquire into the matters set forth in the within precept, according to the tenor thereof."

(Here names of jurors.)
February 4, 1907.

JOSEPH BESCH,
Sheriff.

Commissioner's Precept to Sheriff.

COUNTY COURT — ONTARIO COUNTY.

IN THE MATTER OF THE APPLICATION FOR THE
APPOINTMENT OF A COMMITTEE OF THE
PERSON AND PROPERTY OF EUGENE P.
CLARK, AN ALLEGED INCOMPETENT PER-
SON.

To the Sheriff of the County of Ontario:

I, JAMES A. ROBSON, the commissioner appointed by a commission duly issued out of the County Court of Ontario county, in the above-entitled proceeding, dated the 24th day of July, 1899, pursuant to the provisions of title sixth of chapter seventeenth of the Code of Civil Procedure, to inquire, among other things, as to the incompetency, etc., of Eugene P. Clark, of Manchester, N. Y., and whether said Eugene P. Clark is incompetent to manage himself and his affairs, do hereby require you, pursuant to such commission, to notify not less than twelve nor more than twenty-four indifferent persons qualified to serve, and not exempt from serving, as trial jurors in the County Court, to appear

before me, as such commissioner, at Pratt's Hall in the village of Manchester on the 14th day of September, 1899, at ten o'clock in the forenoon of that day, to make inquiry as commanded by said commissioner.

Given under my hand at Canandaigua, N. Y., this 2d day of September, 1899.

JAMES A. ROBSON, [L. S.]
Commissioner.

Notice of Hearing.

To Eugene P. Clark:

Take notice that a commission to inquire as to your competency to manage yourself or your affairs, issued out of and under the seal of the County Court of Ontario county, and directed to the undersigned, as commissioner, will be executed at Pratt's Hall, in the village of Manchester, in said county, on the 14th day of September, 1899, at ten o'clock in the forenoon of that day.

Dated, September 5, 1899.

JAMES A. ROBSON,
Commissioner.

HOPKINS & CONVERSE, Attorneys for Petitioner.

While the provisions of the Code of Civil Procedure regulating the trial of an issue as to alleged incompetency before a jury do not in terms require notice to be given to the alleged incompetent, except where he is confined in a State institution, such notice must, nevertheless, be given before the trial of the issue, as, otherwise, the incompetent is deprived of his constitutional right to notice of a hearing affecting his property.

It seems, that preliminary notice to the incompetent is not necessary to the jurisdiction of the court, and that notice may be given at any time before proceeding to try the question of competency. *Matter of Fox*, 138 App. Div. 43, 122 Supp. 889.

Oath to Juror.

You do solemnly swear well and truly to inquire touching the incompetency of, and of all such matters and things as shall be given to you in charge by virtue of a commission issued out of and under the seal of the court, and now here to be executed and a true inquisition make, according to the evidence. So help you God.

The commissioners have no right to dictate to the sheriff what jurors shall be summoned. *Matter of Wager*, 6 Paige, 11. In proceedings for the appointment of committee for incompetent persons, the contesting parties upon a hearing before commissioners should be allowed to challenge jurors in accordance with the ordinary practice of obtaining an impartial jury; and a person ought not to be allowed to sit as a juror who states that he has formed an opinion relative to the inquiry, and that it would require some evidence to overcome it. *Matter of Klock*, 19 St. Rep. 309, 3 Supp. 479. In proceedings for an appointment of a committee for a lunatic,

the supposed lunatic may appear and testify before a jury; so, too, the counsel for the lunatic may sum up before the jury and the jury may make recommendations in its verdict. *Matter of Dickie*, 7 Abb. N. C. 420. The jury should inspect the alleged lunatic when possible. *Matter of Russell*, 1 Barb. Ch. 38. And a refusal to permit counsel for lunatic to sum up is error and vitiates the proceedings. *Matter of Church*, 64 How. 393. All the jurors who are sworn and commence should sit during the entire proceeding. *Tebout's Case*, 9 Abb. 211. A majority of the commissioners appointed must decide every question arising upon the examination of the commission. The sheriff should not be present at deliberations of jury. *Matter of Arnhout*, 1 Paige, 497.

Inquisition.

SUPREME COURT — ALBANY COUNTY.

IN THE MATTER OF MARGARET GRAY, AN
ALLEGED INCOMPETENT PERSON.

An inquisition taken at the office of Mead & Hatt, 86 State street, Albany, N. Y., on the 4th day of February, 1907, before Charles S. Stedman, sole commissioner appointed by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of and under the seal of the Supreme Court for the county of Albany, and dated January 26, 1907, directed to the said commissioner, to inquire, among other things, into the incompetency of Margaret Gray upon the oaths of twelve jurors, to wit: (Name jurors.) Good and lawful men, who are indifferent persons, qualified to serve, not exempt from serving as trial jurors in said court, who, being summoned, duly sworn and charged, upon their oaths find and say, that the said Margaret Gray is a lunatic and by reason of such infirmity she is incapable of governing herself or of managing her affairs or property, or properly taking care of her affairs, lands, tenements, goods and chattels, and that such infirmity manifests itself in weakness of mind, neglect of her person, loss of memory, and in illusions, and that such infirmity has manifested itself and existed since May 1, 1906, and still continues.

That the said Margaret Gray heretofore and while under such infirmity and while incapable of managing her property as aforesaid on or about the 11th day of May, 1906, being then the owner thereof, in fee, conveyed the farm and real property which she then occupied, consisting of about ten acres, situate in the town of Bethlehem, county of Albany, N. Y., to Emeline Wheeler and Rosanna Locke, the consideration expressed in the said deed being the sum of five hundred dollars (\$500), and the agreement on the part of the grantees to take care of her during the remainder of her life, which deed was recorded in the Albany county clerk's office, on that day, in book 543 of deeds, page 376.

That the said Margaret Gray has no other real estate.

That the value of the said personal estate of the said Margaret Gray, consisting of moneys on deposit in various banks and trust companies, household furniture, personal ornaments and wearing apparel, amounts in all to about the sum of ten thousand dollars (\$10,000) and produces

an income annually of about five hundred dollars (\$500) per year, which is the amount of her income from her various investments and property.

That the said Margaret Gray is a single person, never having been married, and in her eighty-sixth year; that her father and mother are both dead, and her only heirs-at-law and next of kin are nephews and nieces, whose names and places of residence are as follows, to wit:

(Insert names, &c.)

all of full age and sound mind and they being the persons who would be entitled to her estate in case of her death intestate.

In testimony whereof, as well the said commissioner as the jurors aforesaid have to this inquisition set their hands and seals the day and year first above written.

CHARLES S. STEDMAN, [SEAL.]

(Signatures of jurors.)

Commissioner.

Prior to the enactment of section 2335 the jury were at liberty to inquire and return a statement of the antecedent period over which the lunacy had extended, but now the investigation is confined to the question of incompetency at the time of inquiry, and to permit an intelligent determination of this question, evidence is allowed to be given as to the demeanor and state of mind of the person for not more than two years prior to the hearing, unless the court shall otherwise specially direct. *Dominick v. Dominick*, 10 St. Rep. 33, 20 Abb. N. C. 287. An adjudication that lunacy existed more than two years prior to the date of the inquisition is unauthorized, and the adjudication must be limited to the fact as it exists at the time of inquiry. And thus an inquisition finding that lunacy existed previous to the date of inquisition will be modified by denying confirmation respecting the time prior to the inquisition, but such inquest may be confirmed in so far as it is legal. *In re Cook*, 6 Supp. 720. An order of confirmation will be reversed so far as it relates to the mental capacity of a lunatic prior to the date of the inquest, and the finding on that subject contained in the inquisition stricken out as unwarranted, but in other respects the order may be affirmed. *In re Sanford*, 8 Supp. 940.

In *Reals v. Weston*, 28 Misc. 67, 59 Supp. 807, it was held that the provisions of the Laws of 1874, substantially now found in section 2335 of the Code, limited an inquiry as to sanity to the particular time when such inquiry is actually being made and affords no authority for the finding that the lunatic had been incompetent for the space of about eight months previous.

The inquiry must be confined to the time when the inquisition is taken, unless otherwise provided in the order, and a finding that the incapacity has existed for a given period of time is illegal and

improper, and will be stricken out on appeal. *Matter of Demelt*, 27 Hun, 480.

In *Matter of Schrodtt*, 32 Misc. 540, in the absence of any special direction a writ of *de lunatico inquirendo* should not contain a clause directing an inquiry into the condition of the alleged incompetent for six years last past even though the petition alleges incompetency for the latter period and that the same arose from imbecility, loss of memory, and understanding. The provisions of section 2325 limiting testimony as to acts, sayings, demeanor, or state of mind to two years before the hearing, apply and the scope of those provisions is not enlarged by section 2320.

A jury must confine itself to the mental condition of the alleged incompetent at the time of the hearing and when, without authority, the inquisition finds lunacy prior to the time of hearing, the same is not admissible in evidence to show that the testator, whose will was made before the hearing, lacked testamentary capacity. *Matter of Preston*, 113 App. Div. 732, 99 Supp. 312.

Section 2335 of the Code of Civil Procedure limits an inquiry, with respect to the competency of an alleged lunatic, to the time of the inquiry, and, therefore, it is improper, notwithstanding the provisions of sections 2325 and 2328 of the Code, for the inquisition to determine that the incompetent person had conveyed her real property to her husband during incompetency, or that that condition had extended back for a period of seven months before the inquisition.

The error will not, however, prevent confirmation of the other findings, including that of incompetency at the date of the inquisition. *Matter of Grote*, 31 Misc. 99, 64 Supp. 1035.

If an inquisition in lunacy is sufficient to bring the case within the statute, the court should, notwithstanding any defects in the petition and affidavits upon which it is based, exercise the discretion conferred upon it, and either confirm or refuse to confirm the inquisition, and should not dismiss the petition because of the defects therein.

On an inquisition in lunacy, the jurors retired about noon on Saturday morning, and were kept together without agreement until Sunday, at which time they found the alleged incompetent to be sane; *held*, that the evidence overwhelmingly establishing the insanity of such incompetent, the inquisition would not be confirmed. *Matter of Lewis*, 57 Misc. 670, 109 Supp. 1112.

In *Matter of Mason*, 1 Barb. 436, it is held that the form of the return to the inquisition is only important so far as to satisfy the

conscience of the court. If enough appears upon the inquisition to enable the court to adjudge the party to be within one of the classes of persons over whom the statute has given it jurisdiction it is sufficient.

A finding of commissioners appointed to inquire whether a person named "is a lunatic and is incompetent by reason of such lunacy to manage herself or her affairs," to the effect that she "is incompetent, and in consequence thereof is unable to manage herself or her affairs," is insufficient to support an inquisition and will not be confirmed. *Matter of Wendel*, 33 Misc. 532, 68 Supp. 904, 9 Anno. Cas. 278.

A recommendation of the jury that the party, from long confinement and its consequences, may require some temporary guardianship, does not impair the legal effect of the finding. *Ex parte Dickie*, 7 Abb. N. C. 417.

An inquisition will be set aside as irregular where not signed by the jury. *Matter of Mason*, 51 Hun, 138.

In a proceeding for the appointment of a committee of an alleged incompetent, where jurors find the fact of lunacy and the inquisition is signed by the commissioners, a statement attached to the inquisition, reciting that two of the commissioners do not concur with the finding of the jury, does not affect the validity; Code, sections 2328, 2331, and 2332, providing for a finding by the jurors, and the signing by the commissioners of the finding being mandatory, whatever their views may be. *Matter of Lewis*, 57 Misc. 670, 109 Supp. 1112.

Section 2333 indicates clearly that the Legislature intended that a juror should receive only the same compensation that a juror would be entitled to for serving as such in a court of record in a case in which he was impanelled; while the word "compensation" is used in section 2333, the word "fee" is used in section 2313. The provision of section 2333 is not that jurors are entitled to the same compensation as persons attending the same court to serve as jurors, but is limited to the same compensation as jurors upon the trial of an issue in an action in the same court; therefore, the compensation of jurors in this proceeding is twenty-five cents each. *Matter of Sandford*, 61 Hun, 34, 39 St. Rep. 809, 15 Supp. 291. By section 2333 commissioners are entitled to such compensation as the court directs and jurors are entitled to the same fees as upon the trial of an issue in an action. The fees of the commissioners, the sheriff, and the jurors are a proper charge against

the estate of a deceased lunatic, notwithstanding his death before the confirmation of the inquisition. *Matter of Lofthouse*, 3 App. Div. 139.

Jurors in lunacy proceedings are entitled only to twenty-five cents a day, and their inquisition will be set aside when they are paid more, through arrangement with the sheriff made by the petitioner's attorney. *Matter of Vanderbilt*, 127 App. Div. 408, 111 Supp. 558.

ARTICLE V.

PROCEEDINGS ON RETURN OF COMMISSION. §§ 2336, 2336a, 2337.

Subd. 1. Confirmation and appointment of committee, 420.

§ 2336. *Proceedings upon verdict, or return of commission, 420.*

§ 2336a. *Sections of this title not applicable when application for committee is made under authority of this State, 420.*

§ 2337. *Security to be given by commission, 420.*

Subd. 2. Costs, 426.

Subd. 3. Effect of decree of inquisition, 428.

Subd. 1. Confirmation and Appointment of Committee.

§§ 2336, 2336a, 2337.

§ 2336. *Proceedings upon verdict, or return of commission.*

Upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury, upon the question submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition as justice requires. Where a final order is made, dismissing a petition, the court may, in its discretion, award in the order a fixed sum as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the adverse party. Where a committee of the property is appointed, the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum, for his costs and counsel fees, as it thinks reasonable, and it may, in its discretion, direct the committee to pay a sum, not exceeding fifty dollars and disbursements, to the attorney for any adverse party.

§ 2336a. *Sections of this title not applicable when application for committee is made under authority of this state.*

Sections two thousand three hundred and twenty-five to two thousand three hundred and thirty-six, both inclusive, of this title shall not apply to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement in whole or in part, for maintenance and support in a State institution.

§ 2337. *Security to be given by committee.*

The provisions of article first of title seven, and section two thousand five hundred and ninety-five of article fifth of title second, chapter eighteenth of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a surrogate's court, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given, as prescribed by the court. A committee of the person cannot enter upon the execution of his duties, until security is given, if required by the court.

The court is not restricted in its power to grant a new trial only to cases where a proper inquisition has been returned, and thus an inquisition will be set aside for irregularity or where the facts do not justify the finding of the jury. *Matter of Mason*, 51 Hun, 138, 4 Supp. 662. The court has power to grant a new trial, and an order directing such new trial, after a verdict in favor of the lunatic, will not be reversed on appeal when the evidence is conflicting. *In re Abby*, 6 Supp. 437. In a very clear case of mistake or prejudice of a jury, the court may discharge the inquisition on the mere examination of the supposed lunatic, in connection with the evidence produced before the jury, but it is improper to do so on *ex parte* affidavits, contradicting the finding, with no excuse for not having produced the deponents before the jury as witnesses. *Matter of Russell*, 1 Barb. Ch. 38. The finding and confirmation of an inquisition should not be set aside for mere irregularity where there is no room whatever for doubt of the lunacy. *Matter of Rogers*, 9 Abb. N. C. 141; *Matter of Lamoree*, 32 Barb. 122. Nor for insufficiency in the allegations of the petition. *Matter of Zimmer*, 15 Hun, 214. The defendant is entitled to a new hearing if it appears that the finding against him was induced by any bias or previously formed opinion. *Tebout's Case*, 9 Abb. 211.

The court has power in its discretion to direct a new commission where from the evidence or otherwise there is doubt that the jury erred in finding that the party was not of unsound mind. *Matter of Lasher*, 2 Barb. Ch. 97. An application to confirm or set aside an inquisition of lunacy is addressed very much to the discretion of the court and brings the case before it on the merits. *Matter of Rogers*, 9 Abb. N. C. 141. On petition to supersede the committee of a lunatic on the ground that the alleged lunatic is restored to his right mind, evidence tending to show that the inquisition was procured by fraud will not be received in the absence of such allegations in the petition. *Matter of Zimmer*, 15 Hun, 214. In *Matter of Cooper*, 5 Law Bull. 38, a verdict was set aside as against weight of evidence and trial ordered at circuit on issues framed. An application to set aside the proceedings of a sheriff's jury should be denied, even though section 2330 has not been complied with, if the commission and inquisition have been filed with the clerk pursuant to section 2332. *Matter of Gill*, N. Y. Daily Reg., Aug. 1, 1883.

A motion on behalf of a lunatic for a new trial will be denied where, upon a consideration of the evidence and rulings, the court is satisfied that there is no doubt as to the lunacy of the alleged incom-

petent. *Matter of Williams*, 24 App. Div. 247, 48 Supp. 475; aff'd, 157 N. Y. 704.

In *Matter of Clark*, 57 App. Div. 5, it was *held*: If an inquisition in lunacy is sufficient to bring the case within the statute, the court should, notwithstanding any defects in the petition and affidavits upon which it is based, exercise the discretion conferred upon it, and either confirm or refuse to confirm the inquisition, and should not dismiss the petition because of the defects therein.

An inquisition finding that a certain person "is an incompetent person and unfit to manage his affairs, that such infirmity manifests itself in weakness of mind," amounts to a finding of lunacy within the meaning of section 7 of the Statutory Construction Law (L. 1892, chap. 677), providing that "the terms lunatic and lunacy include every kind of unsoundness of mind except idiocy."

Appeal was dismissed, 169 N. Y. 595, without opinion. In 77 App. Div. 633, *Matter of the Application for the Appointment of a Committee of Clark, an Incompetent Person*, the order appealed from is affirmed. In 175 N. Y., at p. 139, under the title, "In the Matter of the Application of Howland P. Wells, for the Appointment of a Committee of the Person of Eugene P. Clark," the order is reversed, and it is *held*: While a petition and accompanying affidavits, in a proceeding for the appointment of a committee for the person and estate of an alleged incompetent, which allege that the alleged incompetent is "incompetent to manage himself or his affairs, and is of weak mind and easily worked upon by any persons who obtain a controlling influence over him," are sufficient, under the statute (Code Civ. Pro., §§ 340 and 2327), to call into exercise the jurisdiction of the County Court of the county in which the alleged incompetent resides and to justify the inquiry through a commission, or a trial by jury, into the charges of incompetency and sustain a finding upon sufficient evidence of the facts alleged in the moving papers, that the alleged incompetent was a lunatic, or of unsound mind, under the definition of the Statutory Construction Law, section 7, that the term lunacy shall include every kind of unsoundness of mind, except idiocy; a finding by the jury upon such inquisition, "that the said 'incompetent' is an incompetent person and unfit to manage his affairs" and "that such infirmity manifests itself in weakness of mind" is not a sufficient compliance with the statute to warrant the court in further proceeding upon the return of the inquisition; the finding must be so far within the terms of the statute as to leave no doubt that the person has been found to be a lunatic, or of so unsound mind as to be capable of such classification.

Evidence examined, and *held*, that the court in the exercise of a sound discretion should not appoint a committee of the property of a man ninety-five years of age who lived in his own home under the care of a housekeeper and others and who had placed his property in trust with competent persons to pay the income to him for life with remainders over to charitable purposes, even though he was suffering from senile debility and dullness of intellect common to persons of his age. *Matter of Burke*, 125 App. Div. 889. Dismissed, 194 N. Y. 54.

A trust company duly incorporated under the Banking Law may be appointed committee of the estates of lunatics, persons of unsound mind, and habitual drunkards. *Banking Law*, § 186, subd. 10.

The custody of a lunatic's person and estate may be committed to the next of kin, instead of the heir; the presumption is in favor of kinder treatment from a daughter to a mother than from any other relatives. *Matter of Livingston*, 1 Johns. Ch. 436. The guardianship of a lunatic's estate is not as a matter of course to be committed to those presumptively entitled to it on his death, but they will be appointed where they appear to be the persons most likely to protect it. *Matter of Taylor*, 9 Paige, 611. If the next of kin unite in a petition and name the proper person or consent in writing, such person is usually selected. But if they do not so petition or consent there should be an order of reference and notice to the next of kin; it is irregular to appoint a stranger without notice. *Matter of Lamoree*, 19 How. 375, 32 Barb. 122. But on the other hand it is held that the appointment of a stranger as committee of a lunatic or idiot without notifying those who will succeed such idiot as heir is not irregular, and will not be set aside on their motion. *Matter of Owens*, 47 How. 150; *Pickersgill v. Reed*, 5 Hun, 170. It was said in *Matter of Paige*, 7 Daly, 155, limiting 5 Daly, 288, that there is no rule of law excluding the heirs and next of kin of a lunatic from appointment as committee of his person and property; though the court will exercise care and circumspection in appointing those who might be benefited by the lunatic's death, there is no absolute preference as a rule of law between them and strangers. The keeper of an asylum will not be appointed committee of a lunatic. *Matter of O'Connell*, 5 Law Bull. 60. Trust companies may be appointed committee of idiots, lunatics, and habitual drunkards. Chapter 485, Laws of 1885.

The jurisdiction of the Supreme Court over the person and property of a person incompetent to manage himself or his affairs must be exercised by means of a committee of the person and a committee

of the estate, who may be the same or different individuals in the discretion of the court, and the court is empowered to appoint, control, suspend, or remove such committee or allow him to resign. §§ 2322, 2339; *Matter of Andrews*, 192 N. Y. 514, rev'g 125 App. Div. 457, 109 Supp. 831.

The interests of the heirs and next of kin are wholly secondary to the interests of the lunatic, both with respect to her person and estate, and where there exists sufficient reasons for the appointment of the committee, an objection urged against such appointment, because of an alleged indebtedness from the committee to the lunatic cannot prevail. *Matter of Cook*, 25 St. Rep. 64, 6 Supp. 720.

Where the person named by the court as committee was a stranger and was vigorously objected to by the relatives, who presented affidavits tending to show that the selection was not a wise one, which affidavits were contradicted by others presented on behalf of the incompetent; *held*, that under the circumstances of the particular case, a reference should be ordered to take testimony as to the proper person to be appointed. *Matter of Cooper*, 105 App. Div. 449, 94 Supp. 270.

In the selection of the committee the court should exercise the greatest care in order that the rights of all parties interested may be best subserved. The welfare and happiness of the incompetent himself is the important consideration, but where the committee must maintain more or less intimate relations with his relatives, their wishes and interests if they coincide with the incompetent's welfare and happiness ought not to be ignored. *Matter of Cooper*, 105 App. Div. 449, 94 Supp. 270.

Where, upon a motion in a proceeding regularly had in a County Court to confirm the finding of a jury that an unmarried man whose parents are dead is an incompetent person, it appears that the interested parties are not able to agree upon any person as such committee, a brother of the incompetent with whom he has lived on a farm and to whom he is much attached, and to whom he has intrusted for safe-keeping the care and custody of notes and certificates of deposit, will be appointed committee of his person and property, in preference to a brother from whom he is somewhat estranged, and who lives five miles from the farm of the incompetent, though both brothers are equally competent to administer the trust. *Matter of Kane*, 66 Misc. 212, 121 Supp. 667.

A non-resident committee of a non-resident lunatic may be appointed committee of his property in this State, in the discretion of the court, since the enactment of Code, section 2326, but there being

conflicting claims of non-residents, *held*, that the present custodian of his property here, a domestic trust corporation, should be appointed. *Matter of Bartelme*, 34 Misc. 131, 69 Supp. 468.

Petition for Appointment of Committee.

SUPREME COURT — ALBANY COUNTY.

IN THE MATTER OF MARGARET GRAY, AN
ALLEGED INCOMPETENT PERSON.

To the Supreme Court of the State of New York:

Petition of Eveline O. Littell of West Haven, Conn., respectfully shows that heretofore and on the 4th day of February, 1907, Margaret Gray, residing in the town of Bethlehem, county of Albany, N. Y., was declared a lunatic and incapable of attending to her business and affairs, and of caring for her person, by a commission appointed by this court on determination of the jury.

That a committee is about to be appointed of the person and estate of said Margaret Gray, and your petitioner is one of her next of kin and heirs-at-law, the other next of kin (names and addresses), and Edward B. Swart, whose residence is and for many years has been wholly unknown and cannot after diligent inquiry be ascertained, all of whom are nephews and nieces of the said Margaret Gray, and her next of kin.

That your petitioner believes that Samuel S. Hatt of the city of Albany, N. Y., to be the proper person to be appointed committee of the person and estate of said Margaret Gray.

WHEREFORE, your petitioner prays the court that upon filing the security required by law and directed by this court the said Samuel S. Hatt be appointed the committee of the person and estate of the said Margaret Gray, with the usual powers incident thereto.

Dated, *February 6*, 1907.

EVELINE O. LITTELL,

(Verification.)

Petitioner.

Notice of Application for Appointment of Committee.

(Title.)

TAKE NOTICE, That upon the commission heretofore and on the 26th day of January, 1907, issued out of this court in the above-entitled proceeding, and the inquisition taken under such commission and upon the petition of Eveline O. Littell with copies whereof you are herewith duly served, and upon all other papers and proceedings had and taken herein, this court will be moved at the next Special Term thereof, to be held at the courthouse, in the city of Kingston, N. Y., on the 16th day of February, 1907, at the opening of the court on that day, or as soon thereafter as counsel can be heard, that the findings of the jury upon the said commission be confirmed with costs of this proceeding, and for the appointment of Samuel S. Hatt or some other suitable and proper person the committee, of the estate and person of said Margaret Gray, upon the filing by him of the security required by law and directed by the court, and for such further order and relief, or both, as the court may grant in the promises.

Yours, &c.,

Dated, *February 7*, 1907.

MEAD & HATT,

Attorneys for Petitioners.

To MARGARET GRAY, said alleged incompetent person; GEORGE W. MARCELLUS, next of kin of said Margaret Gray, the Superintendent or person in charge of the Albany Hospital.

Order Appointing Committee of Person and Estate of Incompetent Person.
(Title.)

On reading and filing the inquisition taken under and by virtue of the commission heretofore issued out of this court, from which it appears that the said jury have found that the said Margaret Gray is a lunatic, and that she is incompetent, by reason of such lunacy, of governing herself or of managing her affairs, and that she is seized of certain personal property in the said inquisition specified, and on reading and filing the petition of Eveline O. Littell, verified on February 6, 1907, petitioning for the appointment of Samuel S. Hatt, of the city of Albany, as committee of the person and estate of said Margaret Gray, and notice of motion of this application with proof of due and personal service thereof, and of said petition and of said inquisition on said lunatic, Margaret Gray, and upon Jane E. Wade, the assistant superintendent thereof, and the person in charge of, the Albany Hospital, in Pavilion F, of which said institution said Margaret Gray is confined, and upon George W. Marcellus, of Ballston Spa, one of the next of kin of said Margaret Gray, on the 8th day of February, 1907.

Now, on motion of Mead & Hatt, of counsel for said petitioner, and after hearing Edward S. Coons, Esq., of Ballston Spa, of counsel for George W. Marcellus, Robert G. Marcellus, Jacob H. Swart, Franklin O. Swart, Emy M. Swart, Garret H. Oliver and Conrad G. Oliver, next of kin of said Margaret Gray, consenting thereto:

It is hereby ordered that the finding of the jury upon the execution of said commission, as set forth in the said inquisition, be and the same is hereby confirmed.

And it is further ordered, that Samuel S. Hatt, of the city of Albany, N. Y., be and he is hereby appointed the committee of the person and estate of the said Margaret Gray, upon executing and filing with this court a bond with the United States Fidelity & Guaranty Co. as surety in the penal sum of twenty thousand dollars (\$20,000), approved by a justice of this court, conditioned that he will, in all things, faithfully discharge the trust reposed in him and obey all lawful directions of this court, or of a judge thereof, or of any other court or judge, touching the trust; and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his committeeship, whenever he is required so to do by a court of competent jurisdiction.

And it is further ordered, that a commission may be issued to such committee, under the seal of this court, upon the approval and filing of such bond in the county clerk's office of the county of Albany, N. Y.

And it is further ordered, that said committee pay out of the funds in his hands the necessary disbursements of the said petitioner and the sum of three hundred and fifty dollars (\$350) for her costs and counsel fees, and that said committee also pay to said Edward Coons, Esq., of counsel for said next of kin, the sum of fifty dollars (\$50) and his disbursements herein.

JAMES A. BETTS,

Enter in Albany county.

Justice Supreme Court.

Subd. 2. Costs.

The obligation of the sureties on the bond of a committee of an incompetent is for any failure on the part of the principal to account for and pay over moneys which may legally come into his

hands as such committee; therefore, it was held that the sureties are not responsible for the committee's neglect to pay over proceeds of the lunatic's interest in real estate which such committee had assumed to sell without applying to the court for permission to do so; this on the ground that the committee received the money wrongfully. *Johnson v. Ayers*, 18 App. Div. 497.

Matter of Connell, 5 Law Bull. 60, raises the question whether the bond can be dispensed with. The Supreme Court may grant relief to the sureties of a committee, and require new security under chapter 654, Laws of 1881, while by chapter 425, Laws of 1885, a trust company may be appointed committee with or without giving security.

In unsuccessful proceedings for the appointment of a committee for an alleged insane person, on finding of sanity, the court cannot charge costs of the proceedings against the property of the alleged incompetent. *Matter of Hammond*, 59 Misc. 365, 112 Supp. 298.

The granting or refusing of costs rests in the sound discretion of the court, and will not be granted against the estate of the lunatic, unless the proceedings were instituted for his benefit and prosecuted fairly and in good faith. *Matter of Beckwith*, 3 Hun, 443. In that case, where an attorney had taken proceedings to set aside a commission without consulting the lunatic or his family, he was charged with costs. The petitioner is not ordered to pay costs, as, of course, on failure, but will be excused if the petition was in good faith and on probable grounds. *Brower v. Fisher*, 4 Johns. Ch. 411; *Matter of McAdams*, 14 Hun, 492. And where one jury found the party of unsound mind, good faith is presumed. *Matter of Giles*, 11 Paige, 338. The committee in such case will be allowed legal and proper expenses, and counsel fees out of the estate. *Matter of Clapp*, 20 How. Pr. 385. A solicitor who unsuccessfully opposes a commission cannot claim costs against the estate, though the court may allow them in its discretion. *Matter of Conklin*, 8 Paige, 450. The allowance of costs to pay expenses of proceedings on appointment of a committee is in discretion of the court. *Matter of Folger*, 4 Johns. Ch. 170; *Matter of Tracy*, 1 Paige, 583; *Matter of Russell*, 1 Barb. Ch. 39. Where the issue is awarded for the benefit of a third party, for the purpose of sustaining a conveyance from the lunatic, he was ordered to pay costs. *Matter of Van Cott*, 1 Paige, 489; *Matter of Folger*, 4 Johns. Ch. 169. If the wife of a lunatic, without probable cause, applies for the removal of a committee, costs

may be allowed to the committee and denied to her. *Matter of Lytle*, 3 Paige, 251. By rule 72 of 1883 the court may allow the commissioners a compensation not to exceed \$10 for each day for each commissioner, and the court may direct the payment of costs and expenses up to \$250, exclusive of witnesses' fees, but in excess of that the order must be on notice to all parties who have appeared in the proceedings.

The court has power, even after the death of the supposed lunatic before confirmation of the inquisition, to charge his estate with costs by virtue of section 2336. *Matter of Lofthouse*, 3 App. Div. 141.

There is no authority in the Code for awarding costs against a person proceeded against as an habitual drunkard before commissioners, where the proceeding resulted in a determination that such person was not incapable of managing his own affairs, and a provision in the final order directing the trustee of such person who was not a party to the proceeding to pay the fees of the commissioners will not authorize an action to recover the amount by such commissioners against the alleged incompetent. *Sander v. Larner*, 101 App. Div. 167, 91 Supp. 428.

Where, in an action brought by a committee of an incompetent person, the defendant recovers judgment for costs, he may not issue an execution against the plaintiff; and an execution so issued should be vacated on motion. *Wesley v. Wood*, 72 Misc. 258.

Subd. 3. Effect of Decree of Inquisition.

The record in lunacy proceedings holding the person incompetent is conclusive evidence that he was incapable of making a valid contract. *O'Reilly v. Sweeney*, 54 Misc. 408, 105 Supp. 1033.

The fact that an aged woman was, in 1894, declared an incompetent person, and the finding stated that the incompetency dated back to 1892, held not to affect the transfer of a savings bank account by her in 1890. *Jennings v. Hennessy*, 26 Misc. 265, 55 Supp. 833; aff'd, 40 App. Div. 633, 58 Supp. 1142.

A decree upon inquisition in lunacy is conclusive evidence of the insanity of the party from the time when it is found, but it is only presumptive evidence of his incapacity during all the previous time referred to in the finding. *Hardy v. Berger*, 76 App. Div. 393, 78 Supp. 709, 12 Anno. Cas. 118.

The finding of the jury concurred in by the commissioners in the proceedings *de lunatico inquirendo* is not only presumptive evidence of the testamentary incapacity of the decedent, but is conclusive

upon that subject until overcome by satisfactory evidence. *Matter of Widmayer*, 74 App. Div. 336, citing *Wadsworth v. Sharpsteen*, 8 N. Y. 395; *Matter of Coe*, 41 App. Div. 177; *Matter of Clarke*, 57 App. Div. 5.

An habitual drunkard can have no lucid intervals; the inquisition is in the nature of a proceeding *in rem*, and persons subsequently dealing with him are deemed to have notice of his incapacity. *Wadsworth v. Sharpsteen*, 8 N. Y. 388. All acts done after inquisition found are absolutely void. *L'Amoreaux v. Crosby*, 2 Paige, 422. But the finding of an inquisition against an habitual drunkard is only *prima facie* evidence of the invalidity of an act done before the commission issued, but which is overreached by the finding. *Van Deusen v. Sweet*, 51 N. Y. 378; *Van Wyck v. Brasher*, 81 N. Y. 260. In the latter case it is said that an habitual drunkard is not incompetent to execute a deed; he simply is incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind. *Peck v. Cary*, 27 N. Y. 9; *Gardner v. Gardner*, 22 Wend. 526. This holding relates to an act before inquisition found, and does not necessarily conflict with *Wadsworth v. Sharpsteen*, 8 N. Y. 388, *supra*. It is held in *Lewis v. Jones*, 50 Barb. 645, that an habitual drunkard, while subject to a committee, is only *prima facie* incompetent to make a will, and the like rule is held as to a deed. *Van Deusen v. Sweet*, 51 N. Y. 378; *Rider v. Miller*, 86 N. Y. 507; *Hirsch v. Tramor*, 3 Abb. N. C. 274; *Searles v. Harvey*, 6 Hun, 658. So also as to a note. *Hicks v. Marshall*, 8 Hun, 327. And in case of marriage. *Banker v. Banker*, 63 N. Y. 409. It is said a person against whom an inquisition in lunacy has been issued, but who is not concededly incapable of managing his own affairs, cannot be deprived of the control of his property, or the right to take legal proceedings to obtain satisfaction of a valid demand before an adverse decision by a jury. *Estate of Halsey*, 16 Wkly. Dig. 437. A proceeding *de lunatico* has no effect on a contract made without notice, and on the faith that the person contracted with was of competent understanding. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541.

One who has been judicially determined to be a lunatic and for whom a committee has been appointed is incapable of entering into a contract, and any contract he assumes to make is absolutely void.

The presumption of the continuance of the lunacy is conclusive as to all dealings with the lunatic after the inquisition and until it has been superseded. *Carter v. Beckwith et al.*, 128 N. Y. 312.

The presumption of insanity during the life of the inquisition is conclusive, and actual sanity cannot be shown in support of an agreement made during that period. *Wallace v. Frey*, 27 Misc. 29, 56 Supp. 1051.

A settlement made with an adjudged lunatic while the inquisition remained in force is void and cannot be set up as a defense in an action brought by the committee. *Wallace v. Frey*, 27 Misc. 29, 56 Supp. 1051.

In *Hughes v. Jones*, 116 N. Y. 67 (73), the court said: "All contracts of a lunatic, habitual drunkard, or person of unsound mind, made after the inquisition and confirmation thereof, are absolutely void until by permission of the court he has been allowed to assume control of his property. In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity."

ARTICLE VI.

MISCELLANEOUS MATTERS OF PRACTICE.

In *Matter of Andrews*, 129 App. Div. 587, it was held that an application to the Supreme Court to inquire into the present mental condition of one judicially declared incompetent must be made in the judicial district where the incompetent resided at the time she was adjudged insane and that such motion should be in the original proceeding and not entitled as a new proceeding.

On an application for a commission the Special Term is not limited to matters set out in the petition and affidavits supporting it, but interested parties may be heard in opposition. *Matter of Burke*, 125 App. Div. 889, 110 Supp. 1004; *dism'd*, 194 N. Y. 541.

The Supreme Court has inherent power to protect the interests of incompetents, in addition to the power expressly conferred upon it by the Code of Civil Procedure for that purpose.

If the provisions of the Code of Civil Procedure prescribe the way in which the power shall be exercised, such provisions must be followed; but if the Code of Civil Procedure does not regulate the manner in which the power shall be exercised, then it becomes the duty of the court to determine the mode and manner in which the power can be best exercised to effect the end desired. *American Mortgage Co. v. Dewey*, 106 App. Div. 389, 94 Supp. 808, 35 Civ. Pro. 48.

A motion to open defendant's default, and to set aside a verdict finding him insane, and to direct commissioners to reconvene and allow him to present his defense, will be granted where his request for adjournment because of illness of counsel was refused, and sub-

stituted counsel asked an adjournment for two days in which to prepare for hearing, which was also refused, on condition that the costs of the proceeding to date be paid by respondent or his estate. *Matter of Hammond*, 55 Misc. 124, 106 Supp. 285; aff'd, 125 App. Div. 865.

Where one, not being represented in the proceeding, has been adjudged a lunatic, he has an absolute right to a rehearing, and an imposition of the payment of costs to date as a condition for opening the "default" is an abuse of the discretion of the court.

It being determined on the rehearing that the proceeding was not justified, the court cannot by summary order require the alleged incompetent to pay the petitioner or his attorney any part of the expenses incurred by the petitioner in the proceeding to deprive him of his property or liberty. *Matter of Hammond*, 125 App. Div. 865, 110 Supp. 643, aff'g 55 Misc. 124.

The question as to the sanity of one who has been regularly committed should not be tried upon habeas corpus while proceedings for the appointment of a committee are pending which will determine the question with the aid of a jury. *Matter of Laurent*, 11 Abb. N. C. 120.

Where no committee has been appointed, the fact that a person has been found incompetent upon the return of an inquisition does not absolutely preclude her from changing her residence to another State. *Matter of Fidelity Trust Co.*, 27 Misc. 118, 57 Supp. 361.

Where a proceeding for the removal of the committee of an incompetent person and the appointment of another has been duly instituted by petition, of which the court has taken cognizance by appointing a special guardian for the incompetent and referring the matter to a referee to take proof and report the testimony to the court with his opinion thereon, the court has no power, during the pendency of the proceeding and before any testimony has been taken therein, to make, in other and different matters affecting the incompetent's estate, but involving no question of the removal of the committee, an order removing such committee and appointing a successor. *Matter of Andrews*, 192 N. Y. 514, rev'g 125 App. Div. 457, 109 Supp. 831.

Where an alleged incompetent while sojourning in another State was inveigled into an insane hospital, and there incarcerated and a guardian appointed for her for the fraudulent purpose on the part of her relatives to get possession of her estate, when in fact she was not insane, such proceedings did not amount either to an adjudication of her non-residence in New York, or as to her insanity, and

were open both to direct and collateral attack in proceedings in New York. *Matter of Bergmann*, 110 App. Div. 588, 97 Supp. 346; *Gaffney v. Brinnier*, 110 App. Div. 588, 97 Supp. 346.

A sheriff's jury or a jury at a Trial Term of the court are the proper tribunals to try questions of fact as to incompetency, and, therefore, it seems that where there is a question as to incompetency, the matter should not be decided upon affidavits but should be sent to the tribunals provided for by the law for that purpose to have the question of competency fully inquired into. *Matter of Beach*, 23 App. Div. 412.

The committee of a lunatic, appointed abroad, has no authority over his property in this State. *Matter of Perkins*, 2 Johns. Ch. 124; *Matter of Petit*, 2 Paige, 174; *Matter of Ganse*, 9 Paige, 416; *Matter of Neally*, 26 How. Pr. 402; *Matter of Traznier*, 2 Redf. 171; *Weller v. Suggett*, 3 Redf. 294. In *Matter of Colah*, 6 Daly, 308, the court refused to turn over to the foreign committee of the lunatic, who had become insane here and had been sent home, his estate here.

Questions of practice relating to regularity of proceedings upon execution of commission cannot be reviewed collaterally. *Van Deusen v. Sweet*, 51 N. Y. 378.

In such proceeding an order enjoining one to whom the incompetent conveyed his property from disposing of or incumbering the same is incidental to the order for a commission and falls when it falls. *Matter of Vail*, 137 App. Div. 220, 121 Supp. 958; *dism'd*, 199 N. Y. 560.

Where a defendant, who has a substantial interest in a controversy, is *non compos mentis*, but has not been judicially declared insane, and the court, under the provisions of section 427 of the Code of Civil Procedure, directs that the summons be delivered on her behalf to a third person, the duty of such third person is not confined to the mere receiving of the summons, but the order directing the delivery of the summons to him should be sufficiently broad to enable him to look after the interests of the incompetent defendant at every stage of the action. *American Mortgage Co. v. Dewey*, 106 App. Div. 389, 94 Supp. 808, 35 Civ. Pro. 48.

The resignation of the committee will not be accepted merely because the duties have become unpleasant. *Matter of Lytle*, 3 Paige, 251. An order of reference will be made on such an application. *Matter of Miller*, 15 Abb. 277.

Where it has been adjudged by the court of this State that a foreign tribunal adjudging a person incompetent and appointing a

committee had jurisdiction, the foreign decree cannot be attacked collaterally in this State. The incompetent claiming to be restored to sanity should proceed in the foreign tribunal. *Matter of Curtiss*, 137 App. Div. 584, 122 Supp. 468; aff'd, 199 N. Y. 36.

Where there are orders of the court still in force that an incompetent be not removed without a further order on notice to certain persons, an application for removal not based on the claim of sanity should be in the form of a notice of motion to modify the orders and be served on the required persons. *Matter of Andrews*, 126 App. Div. 794, 111 Supp. 417.

Code of Civil Procedure, section 3271, provides that, in an action by the committee of an incompetent, the court may require the plaintiff to give security for costs. *Held*, that the plaintiff in an action against the committee of an incompetent cannot by such section be required to give security for costs. *Kelly v. Kelly*, 77 App. Div. 519, 78 Supp. 918.

Although one to whom an incompetent has conveyed his property has no standing to appeal from an order directing that a commission issue except as she has been enjoined from disposing of such property, where it appears that there is no necessity for a committee, the entire order will be reversed. *Matter of Vail*, 137 App. Div. 220, 121 Supp. 958; *dism'd*, 199 N. Y. 560.

Objection to provisions in the judgment for costs and for the allowance of an execution cannot be first raised on appeal. *La Grange v. Merritt*, 96 App. Div. 61, 89 Supp. 32.

The Appellate Division may review the discretion of the Special Term in granting an order directing that a commission *de lunatico inquirendo* issue. *Matter of Burke*, 125 App. Div. 889, 110 Supp. 1004; *dism'd*, 194 N. Y. 541.

Upon an appeal from an order confirming the report of a referee appointed to take and state the account of the committee of an incompetent, the Appellate Division has no power to correct the account. *Matter of Nutting*, 74 App. Div. 468, 77 Supp. 696.

ARTICLE VII.

POWERS AND DUTIES OF COMMITTEE. §§ 2338, 2339, 2340.

Subd. 1. General powers and compensation, 434.

§ 2339. *Committee under control of court; limitation of powers, 434.*

§ 2338. *Compensation of committee, 434.*

Subd. 2. Right of committee to maintain and defend actions, etc, 440.

§ 2340. *Committee of property may maintain actions, etc, 440.*

Subd. 3. Method of enforcing claims against estate of lunatic, 442.

Subd. 1. General Powers and Compensation. §§ 2338, 2339.**§ 2339. Committee under control of court; limitation of powers.**

A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal or resignation may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

§ 2338. Compensation of committee.

A committee of the property is entitled to the same compensation as an executor or administrator. But in a special case, where his services exceed those of an executor or an administrator, the Supreme Court or a county court within the county may allow him such an additional compensation for such additional services, as it deems just. The compensation of a committee of the person must be fixed by the court, and paid by the committee of the property, if any, out of the funds in his hands. The additional compensation authorized by this section may be allowed to the committee upon any judicial settlement made by him, and shall be for such additional services up to and including such settlement.

The committee merely represents the court in the exercise of its power over the property of incompetents, and is subject to the order of the court with respect to the care, management, and disposition of such property. *Matter of Horton*, 18 Misc. 406. See *Code Civ. Pro.*, § 2339; also, *Butler v. Jarvis*, 51 Hun, 248, 4 Supp. 137; *Runberg v. Johnson*, 11 Civ. Pro. 283.

By section 2329 the committee of the person or property of the lunatic is subject to the direction and control of the court by which he was appointed with respect to the execution of his duties. One of these duties is, upon the termination of his office, to hand over the property of the lunatic to the proper parties. The Supreme Court has power to pass upon the accounts of the committee of a lunatic and allow his commissions notwithstanding section 2344. *Matter of Grout*, 64 St. Rep. 340, 31 Supp. 602, 83 Hun, 27.

In *Matter of Burr*, 17 Barb. 9, Mr. Justice Hand defines the duties of the committee as follows, citing many authorities: "The duties of the committee of the person are very delicate and important, being, says Mr. Shelford, to administer all the comfort and amusement the nature of the case will admit or the funds of the lunatic afford. He should be treated with great kindness, and all reasonable means of restoration should be employed, and, so far as necessary for this purpose, the expectations of the next of kin and all others disregarded; the great principle that pervades all orders in cases of lunacy is solely and exclusively his interest and comfort."

The first duty of the committee of a lunatic is to provide for the comfort and care of the lunatic so far as is compatible with his estate, but, if he receives such care, it is immaterial that he is kept in a hospital where no charge is made for his care, or where his services are sufficient to pay therefor. *Matter of Nutting*, 74 App. Div. 468, 77 Supp. 696.

It is the paramount duty of the committee of a lunatic to attend to her personal wants and comforts and to furnish her, so far as the funds in his hands will allow, with not only all the necessities of life, but all the proper recreation and amusements consistent with her former habit of living. It is his duty likewise to avail himself of medical advice, and other reasonable means that may tend to the restoration of his ward, or the amelioration of her condition. The care, health, and comfort of the lunatic alone are to be considered, and this without reference to the interests of the next of kin, heirs-at-law, and expectants. *Matter of Reed*, 18 Misc. 285, 41 Supp. 156.

After an adjudication of lunacy has been made and confirmed, and a committee appointed and qualified, the committee occupies the same place and fills the same position as the lunatic in regard to his personal estate and property. He has the same right to deal therewith as the lunatic enjoyed before inquisition found, and is his representative in respect to all matters connected with the estate. *Viets v. Union Nat. Bank of Troy*, 101 N. Y. 569.

In *Pharis v. Gere*, 110 N. Y. 336 (347), it was stated, citing *The Matter of the Application of Otis*, 101 N. Y. 581: "That the committee had no interest in the property; that his possession was the possession of the court, and his authority that of its agent acting under its direction. The committee thus becomes merely the officer or agent of the court, and has no authority except such as comes from that source or is vested in him by statute. The committee is but the hand of the court, moving only as moved by the dominant will."

A committee takes no title to the real or personal estate of a lunatic. He is a mere bailiff to take charge of the property and to administer it subject to the direction of the court, and his possession is the possession of the court. Through him the court preserves the property intrusted to it, but the legal title to the property remains as before. Nothing is taken from the lunatic but its control and management. *Kent v. West*, 33 App. Div. 112, citing *Matter of*

Application of Otis, 101 N. Y. 580; *Pharis v. Gere*, 110 N. Y. 336 (347); *People ex rel. Smith v. Com'rs of Taxes*, 100 N. Y. 215.

The committee of a lunatic has no title to the property of the lunatic, but acting as agent, officer, or bailiff, discharge a trust imposed upon him by the court, and until the accounts of the committee are closed and the funds are handed over, he and they remain under the control of the court. The title to the estate of the lunatic passes, upon his death, into the hands of his administrators. *Forbell v. Denton*, 53 App. Div. 402, 65 Supp. 1120.

Independent of statute, courts have no authority to sell the real estate of a lunatic, even for the payment of his debts, and even though his heirs-at-law and next of kin consent to such title. *Walrath v. Abbott*, 75 Hun, 450, 59 St. Rep. 644. It seems that if the committee without the order of the court convey real property of the lunatic, no title will be acquired by the transferee which would be good against the lunatic or his heirs. Nor will it be presumed that the committee had procured the proper order to make such sale. *Walrath v. Abbott*, 92 Hun, 606.

The committee of the person and estate of the lunatic who purchased real estate with the name of the lunatic has no right to take title in his own name as committee, but such title should be taken in the name of the lunatic. *People ex rel. Canaday v. Williams*, 90 Hun, 503.

Any proceedings which have for their design to divest a lunatic of his title to real property and to transfer it to another are in derogation of the common law, which requires every prerequisite to be fully and literally observed. Thus, where the committee of the lunatic transferred his real property by the execution and delivery of a deed, without permission of the court, he thereby transferred no title, and, therefore, any consideration he received did not legally come into his hands; *held*, therefore, that his sureties were not liable for his failure to pay it over. *Johnston v. Ayres*, 18 App. Div. 498.

Mortgage on the real estate of a lunatic made without the authority of the court is void, and the record of a deed signed and acknowledged by persons described therein as "committee of the estate," though they have been appointed committee of his person and estate, creates no lien. *Corbin v. Dwyer*, 30 Misc. 488, 63 Supp. 822; modified, 57 App. Div. 630, 68 Supp. 1136.

Under Code, section 2339, providing that a committee of the property of a lunatic cannot alien, mortgage, or otherwise dispose

of her real property except to lease it for a term not exceeding five years after the special direction of the court obtained in proceedings taken for that purpose, a lunatic's committee had no authority to authorize the cutting of timber on a lunatic's land without an order of court, nor to ratify authority given for that purpose by the lunatic's husband and son.

The committee of a lunatic is the mere custodian of her property, the title to which remains in the lunatic notwithstanding the committee's appointment. *Scribner v. Young*, 111 App. Div. 814, 97 Supp. 866.

The committee of a lunatic's estate who invested it in a mortgage on realty may release a part of the mortgaged premises without applying to the court. *Pickersgill v. Reed*, 5 Hun, 170.

A committee of a lunatic cannot make a valid deed of the latter's property, under an order authorizing him to mortgage the same. *Reals v. Weston*, 28 Misc. 67, 59 Supp. 807.

Where the committee of a lunatic, who owned an undivided interest in real estate, without authority from the court, purchases the premises for their fair value, in the name of his wife, at a partition sale which is open and fair, and the wife subsequently conveys the premises to the committee for a nominal consideration, the latter's title is not marketable. *Taylor v. Klein*, 47 App. Div. 343, 62 Supp. 4; aff'd, 170 N. Y. 571.

As to power of committee to dispose of real property of a lunatic, see title 7 of the Code, sections 2345, 2364, relative to proceedings for disposition of the real property of an infant lunatic, etc.

A committee may ask the court for instructions concerning the scope of his power to deal with the estate in his hands, or, in case the existence of the power is clear, but discretionary, to seek the wisdom of exercising it in a particular method. *Kent v. West*, 33 App. Div. 112, 53 Supp. 244; dism'd, 163 N. Y. 589.

A person who had been declared incompetent was entitled to one-half of the rents of certain premises which were collected by an administratrix. *Held*, that she was bound to pay them over to his committee as collected, and could not retain them until annual accountings were had before the surrogate. *Matter of Cowen*, 105 App. Div. 596, 94 Supp. 303.

Where the committee of an incompetent comes into possession of securities which constitute a good investment and the principal is not presently needed for use, it is not the duty of the committee to convert the securities into cash, but to hold them as an investment.

Where the committee receives and holds securities which it does not become his duty to turn into cash, he should be compensated for his services upon the same basis as if he had turned them into cash. *Matter of Notman*, 103 App. Div. 520, 93 Supp. 82.

Where a lunatic has incurable paresis, the committee should not act according to the instructions of the expectant heirs and next of kin. It is the benefit and comfort of the incompetent person which the committee must first hold in mind. *Matter of Brayer*, 57 Supp. 957.

Spending money should not be allowed by the committee to a drunkard. A committee who gave the drunkard \$30 per month for spending money, held guilty of gross negligence, and \$75 per annum will be allowed on their accounting. *Stephens v. Marshall*, 23 Hun, 641.

If any person is furnishing an habitual drunkard with the means of intoxication, the committee should apply to the court for an order restraining all persons from furnishing the drunkard with ardent spirits or means of obtaining it without the sanction of the committee, and a violation of the order, after notice, will be punished as a contempt. *Matter of Heller*, 3 Paige, 199; *Matter of Hoag*, 7 Paige, 312. Judgments by an innkeeper for ardent spirits sold under such circumstances were set aside. *L'Amoreaux v. Crosby*, 2 Paige, 402.

Where a lunatic continued to reside with his family after inquisition, and parties ignorant of the commission furnished him groceries, the bill was ordered paid by the committee. *Matter of Wing*, 2 Hun, 671. See *Ex parte Cunningham*, 2 Hun, 114. The committee of a lunatic, by taking possession of property leased by a lunatic, and continuing it for the use of the estate, makes himself liable in the same manner as an executor or trustee. *Matter of Otis*, 34 Hun, 542.

The committee of a lunatic may lawfully consent that the court direct that a part of the disbursements ordered be paid out of moneys in the hands of a committee of the lunatic appointed in a foreign jurisdiction. *Matter of Ashley*, 67 App. Div. 138, 73 Supp. 605.

The Supreme Court, by virtue of its inherent jurisdiction over the persons and estates of incompetents, may appoint a guardian *ad litem* for one adjudged to be a habitual drunkard when no committee of his property has been appointed in order that he may sue in equity to set aside a note alleged to have been procured from the incompetent by one occupying a fiduciary relation, and to vacate a

judgment taken by default in an action on the note, if no committee of the property of the incompetent has been appointed, but merely a committee of his person.

An incompetent retains title to his property, although a committee of his person has been appointed, and even a committee of the property is a mere bailiff appointed to administer it subject to the direction of the court.

A guardian *ad litem* is not a party to a suit, but an officer appointed by the court to prosecute or defend in the interest of the incompetent.

It seems that the statute giving a committee of the property the right to sue is merely permissive and does not prevent the court from appointing a guardian *ad litem* for the purpose. *Moore v. Flagg*, 137 App. Div. 338, 122 Supp. 174.

The Code of Civil Procedure does not authorize the maintenance of an action by an incompetent person through a guardian *ad litem*.

If the property interests of the incompetent require the commencement of an action to recover the fund in controversy a committee of such fund should be appointed who would be entitled to prosecute such action. *Rankert v. Rankert*, 105 App. Div. 37, 93 Supp. 399.

Where an action was commenced by the guardian *ad litem* on behalf of an infant and a committee of his property was subsequently appointed, the court properly ordered substitution of said committee as party plaintiff in place of the infant and it is not necessary that the order should be made *nunc pro tunc* as of the time of the commencement of the action. *Callahan v. N. Y. C. & H. R. R. R. Co.*, 99 App. Div. 56, 90 Supp. 657.

An incompetent person is a necessary party defendant to an action for a slander alleged to have been committed prior to a determination that he is insane, although a committee has been appointed. *Capen v. Delaney*, 128 App. Div. 648, 113 Supp. 50.

The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account. The incompetent is not prejudiced because the special guardian has merely received just compensation for his services, and the committee is not prejudiced because the sum was paid out of the estate. *Matter of Edwards*, 110 App. Div. 623, 97 Supp. 185.

Subd. 2. Right of Committee to Maintain and Defend Actions.**§ 2340.**

§ 2340. Committee of property may maintain actions, etc.

A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made.

A committee of a lunatic may sue on a note payable to the lunatic which has been lost, and may offer the indemnity provided under section 1917 at the trial in the first instance. *Cuff v. Heine*, 27 Misc. 498, 58 Supp. 324, rev'g 26 Misc. 859, 56 Supp. 393; *Dupignac v. Quick*, 27 Misc. 500, 58 Supp. 341, aff'g 26 Misc. 872, 56 Supp. 385.

A committee of an incompetent may maintain an action against executors who withhold a share in an estate which has fallen to the lunatic since the committee was appointed, and it is no answer that his bond was not given with a view to his receiving the share. *Wright v. Hayden*, 31 Misc. 116.

A deposit made by one afterward declared a lunatic, with attorneys, for the purpose of beginning a divorce suit, may be recovered back by his committee where the summons had not been served before notice of the rescission, though papers had been prepared, such preparation being of no benefit to the lunatic. *Feigenbaum v. Howe*, 32 Misc. 514, 66 Supp. 378.

The committee of a lunatic may maintain trover for the tortious taking of property from the lunatic under the guise of a contract, before the appointment of the committee, but within the time for which the lunatic's insanity was judicially determined. *Sander v. Savage*, 75 App. Div. 333, 78 Supp. 189.

The word "may" in section 2340, giving the committee authority to sue, should not be construed as "must" or "shall." The section is permissive only and not mandatory. An action of ejectment may, therefore, be properly brought in the name of the plaintiff, although he is a lunatic and although a committee has been appointed of his person and estate. In equity actions, however, the lunatic should be named as party suing by his committee, unless the action is for a debt transferred to the committee, as to which matters the committee may be sued in their own name. *Skinner v. Tibbits*, 13 Civ. Pro. 372.

The committee of a lunatic is a "person aggrieved" on certiorari to review an assessment, and, therefore, may review such assessment. Under the authority of section 2340 he may have such a writ of certiorari to review such assessment. *People ex rel. Canaday v. Wil-*

liams, 90 Hun, 502. The law before the passage of the Code of Civil Procedure authorized committees to sue only in cases relating to personal estate; but by virtue of section 2340 power was given to the committee to institute actions relating to real estate. Mr. Throop, in his notes to this section, says that the provision "was amended so as to embrace all cases where a remedy is pursued." Therefore, the committee of the lunatic may maintain an action for the partition of real estate in his own name by adding his official title. He need not make the lunatic a party. *Koepke v. Bradley*, 3 App. Div. 391, 38 Supp. 707; aff'd, 151 N. Y. 622.

A committee may sue in his own name to cancel the sale of a farm to a lunatic, and to procure satisfaction of a mortgage executed by him. *Fields v. Fowler*, 2 Hun, 400. Although it was held before the enactment of this section that the committee was not the trustee of an express trust, and not authorized to bring an action as to real estate. *Burnet v. Bookstaver*, 10 Hun, 481; *McKillip v. McKillip*, 8 Barb. 552. But a contrary rule is held in *Pearson v. Warren*, 14 Barb. 488. Committee cannot ratify a contract of a lunatic made by him after office found, so as to maintain an action upon it. *Fitzhugh v. Wilcox*, 12 Barb. 235. The committee of a lunatic may maintain an action to set aside a purchase of real property, pending a commission against the vendor as an habitual drunkard. It is contempt of court. *Griswold v. Miller*, 15 Barb. 520.

The committee of a lunatic appointed in proceedings instituted after an action was begun against the lunatic by attachment, under which her real estate was seized, she being in confinement in a foreign country, may properly be denied permission to appear specifically in the action for the purpose of having it stayed and all proceedings vacated on the ground permission had not been granted to sue, though he may come in and defend the action. *Carter v. Burrall*, 80 App. Div. 395, 81 Supp. 30.

If an action be commenced against an incompetent not judicially declared insane, on the subsequent appointment of a committee the court may enjoin the action or grant leave for its continuance. The court will not be concluded by the fact that the committee has served an answer, as a committee cannot maintain an action without leave of court. *Grant v. Humbert*, 114 App. Div. 462, 100 Supp. 44.

The committee of a lunatic may invoke the equitable jurisdiction of the court for the protection of the lunatic's estate from the neglect or mistake of the committee without the aid of section 2340 of the Code of Civil Procedure which seeks only to authorize the

committee to bring such actions and institute such proceedings as the lunatic would have had the right to bring or institute had no committee been appointed. *Haring v. Murphy*, 60 Misc. 374, 113 Supp. 452.

Subd. 3. Method of Enforcing Claims Against Estate of Lunatic.

Chapter 697 of the Laws of 1893 provided a full and complete scheme for enforcing payment of debts of an incompetent person. This chapter has been made part of Consolidated Laws, Debtor and Creditor Law, article 9, sections 250 to 255, which provides for notice to creditors of an incompetent person to present claims duly verified to the committee, authorizes the committee to compromise claims against the estate of the incompetent, provides for the manner of payment of claims, and distribution of assets of the incompetent among creditors and for a judicial settlement of the accounts of the committee in connection with such payment and adjustment of claims against the estate of the incompetent, granting to the courts having jurisdiction over the property of the lunatic, idiot, or habitual drunkard, the powers in relation to such estates, claims, property, and committee which devolve on the courts in relation to assignments and assignees for benefit of creditors.

The Code, sections 426-429, provides for service of process on a lunatic both before and after inquisition.

In case a lunatic has not been so judicially declared, the court may, in its discretion, require the summons to be served upon a person designated in the order. § 427.

The fact of lunacy does not prevent the commencement of an action before inquisition. *Prentiss v. Cornell*, 31 Hun, 167.

The regulations of the State Lunacy Commission preclude service on an inmate of a State hospital for the insane, without an order of a judge of a court of record granting leave to make such service. Such an order does not constitute leave of the court to bring an action but such leave is not necessary where there has been no judicial determination of incompetency. *Grant v. Humbert*, 114 App. Div. 462, 100 Supp. 42.

After inquisition the service is to be made on both the incompetent person and the committee and when the interest of the committee is adverse to the lunatic, and if necessary, the court may appoint a special guardian to look after his interests. § 428.

Also after inquisition the court may dispense with service of summons on the lunatic and service on the committee shall be deemed sufficient. § 429.

The defendant sought to reverse a judgment on the ground that the plaintiff was insane at the time of the commencement of the action, and was incompetent to employ an attorney, and, therefore, the attorney was without authority to appear for him. The plaintiff had not been judicially declared to be a lunatic, but was confined in an asylum and pronounced by the physicians there to be incurably insane. *Held*, that the right to commence an action in the name of a person of unsound mind, before he is declared to be such, is implied by section 2340. That a lunatic has a legal standing to appear as a party until a committee has been appointed as provided by law. *Rumberg v. Johnson*, 5 St. Rep. 860.

An action cannot be begun against a committee of the estate of an incompetent person until leave of the court has been first obtained. *Smith v. Keteltas*, 27 App. Div. 279, 50 Supp. 471.

Although an action against a person as the committee of an insane person is improperly brought without leave of the court, such leave may be granted *nunc pro tunc* at the time of the trial. *Dunham v. Fitch*, 48 App. Div. 321, 62 Supp. 905.

An attachment against a non-resident lunatic will not be stayed at the instance of a subsequently appointed committee on the ground that no permission had ever been granted to sue the committee. *Carter v. Burrall*, 80 App. Div. 395, 81 Supp. 30.

Permission to sue the committee of a lunatic is not a determination that the petitioner has a cause of action. The court in granting leave to sue is not called upon, and does not advise, upon the question of the committee's liability. *Kent v. West*, 33 App. Div. 112.

The proper course, where there is a committee, is to petition the court, which may either allow a suit or direct a reference. *Matter of Hopper*, 5 Paige, 189; *Williams v. Cameron*, 26 Barb. 172; *Soverhill v. Dickinson*, 5 How. Pr. 109; *Matter of Wing*, 5 Hun, 170; *Sandford v. Sandford*, 62 N. Y. 553; *Robertson v. Lain*, 19 Wend. 649; *Clarke v. Dunham*, 4 Denio, 262; *Matter of Heller*, 3 Paige, 199; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242, 400.

Where the motion for leave to sue is heard on conflicting affidavits it will be granted, where a case is shown, which, if proved, would entitle a party to relief in equity. *Matter of Wing*, 2 Hun, 671. The same rule, requiring leave to sue as to habitual drunkards, is held in *Brown v. Betts*, 13 Wend. 29; *L'Amoreaux v. Crosby*, 2 Paige, 422; *Niblo v. Hamson*, 9 Bosw. 668; *Hall v. Taylor*, 8 How. Pr. 428. Proceedings to foreclose a mortgage against an habitual

drunkard cannot be taken without leave of the court. *Ex parte Parker*, 6 Alb. Law. Jour. 324.

An order permitting service of a summons on one confined in a State hospital for the insane does not constitute a leave of the court to bring an action.

But such leave of court to sue an incompetent person is not necessary unless he has been judicially declared insane and a committee appointed. In the latter case the court takes possession of the property of the incompetent through its committee and neither the incompetent nor the committee can then be sued without leave of court. In the absence of such leave an action may be enjoined, a summons set aside, or a plaintiff punished for contempt. On the contrary, the court may authorize a suit in order to liquidate a claim against the incompetent even though a committee has been appointed, but the plaintiff obtains no lien prior to other creditors as he has no right to execution. *Grant v. Humbert*, 114 App. Div. 462, 100 Supp. 42.

In *Sanford v. Sanford*, 62 N. Y. 553, Judge Allen said: "There was no legal impediment to an action against the intestate. Had there been a committee in office, the creditor could have petitioned the court either for a summary adjustment and payment of her claim, or for leave to sue. As there was no committee, although it seems the judgment of the court, determining that the debtor was *non compos mentis*, was in force, the plaintiff might have applied to the court for leave to sue, or, perhaps, have brought an action without such leave."

Where a defendant, who has a substantial interest in a controversy, is *non compos mentis*, but has not been judicially declared insane, and the court, under the provisions of section 427 of the Code of Civil Procedure, directs that the summons be delivered on her behalf to a third person, the duty of such third person is not confined to the mere receiving of the summons, but the order directing the delivery of the summons to him should be sufficiently broad to enable him to look after the interests of the incompetent defendant at every stage of the action. *American Mortgage Co. v. Dewey*, 106 App. Div. 389, 94 Supp. 808.

Where, after an adult defendant has interposed an answer, a guardian *ad litem* is appointed to represent her on the ground that she is insane, such guardian *ad litem* is not a party to the action and he is not entitled to be made a party, nor to interpose an answer. He is, however, entitled, under the provisions of sections 427 and

428 of the Code of Civil Procedure, to notice of all further proceedings in the action and, to the extent that it may be advisable and proper, to intervene and "conduct the defense for the incompetent defendant." *Behlen v. Behlen*, 73 App. Div. 143, 76 Supp. 747.

Lunatic defendant can voluntarily appear, and the court will appoint guardian *ad litem* for him in partition. *Rogers v. McLean*, 34 N. Y. 536. The committee will, of course, be appointed special guardian where he has no adverse interest to the lunatic where both are sued. *New v. New*, 6 Paige, 237. A committee who has consented to have the rights of the parties litigated on a bill filed cannot afterward object that he had been proceeded against in that manner, without leave of the court by which he was appointed. *Outtrin v. Graves*, 1 Barb. Ch. 49. An attorney was authorized to appear for an idiot of full age on his retainer, in *Faulkner v. McClure*, 18 Johns. 134. As to when a judgment against a lunatic is not void. *Sternbergh v. Schoolcraft*, 2 Barb. 153; *Matter of Hopper*, 5 Paige, 489; *Person v. Warren*, 14 Barb. 488; *Loomis v. Spencer*, 2 Paige, 153; *Prentiss v. Cornell*, 31 Hun, 167; aff'd, 96 N. Y. 665. Judgment was set aside in *Demelt v. Leonard*, 19 How. Pr. 140.

Pending an action, the defendant was adjudged a lunatic and her committee thereupon substituted as a party; *held*, a good defense to the action that no leave had been granted to sue the committee. *Matter of Delahunty*, 44 St. Rep. 836.

The court on the finding of an inquisition establishing lunacy is vested with jurisdiction over the person of the lunatic and assumes the custody and control of his estate, which it manages through the committee appointed in the proceedings, as its bailiff or agent, and although the title of the lunatic to his property is not divested by the proceedings, he can no longer buy or sell, or enter into any contract or dealing binding him or his estate. The incapacity of a lunatic whose lunacy has been judicially ascertained in lunacy proceedings to bind himself does not relieve his estate from debts or liabilities incurred anterior to the lunacy. But he cannot be sued without permission of the court, except at the peril of the party prosecuting of having his action restrained and of being adjudged in contempt. The court, as incident to its jurisdiction in lunacy, administers the estate of an adjudged lunatic for the protection of creditors, and will apply it to the payment of his debts, the expenses of support and maintenance of the lunatic and his family, and the

satisfaction of all obligations, charges, and expenses which legally or equitably ought to be satisfied out of his property. *Carter v. Beckwith et al.*, 128 N. Y. 312 (316).

After inquisition found, and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of the demands existing against it, and this relief may be granted on petition of a complainant, but where the estate is insufficient to pay all the debts in full, the assets, personal and real, must be distributed among the claimants ratably. Where the committee occupied leased premises, and carried on the business of the lunatic, the rent accruing will be regarded as a reasonable expense incurred by the committee, to be paid in preference to other creditors. *In re Otis*, 101 N. Y. 580.

The court, as incident to its jurisdiction in lunacy, administers the estate of an adjudged lunatic for the protection of creditors, and will apply it to the payment of his debts, the expenses of support and maintenance of the lunatic and his family, and the satisfaction of all obligations, charges, and expenses which legally or equitably ought to be satisfied out of his property. An action at law to recover for services rendered the committee should not be allowed, but resort should be had to the estate, either through an account and a claim duly made upon the property in the hands of a committee, or by direct application to the court for an allowance to be paid out of the funds of the estate. Any person having such claim may resort to this summary remedy. *Kent v. West*, 33 App. Div. 112, 53 Supp. 244.

Where the estate of an incompetent is insufficient to pay the claims, the court must apply the property in payment thereof *pro rata*, without preference, excepting where, prior to the adjudication of incompetency and the appointment of the committee, a creditor has in good faith obtained a lien. *Grant v. Humbert*, 114 App. Div. 462, 100 Supp. 44.

After inquisition found and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of demands existing against it, and this relief may be granted on petition of a claimant.

Where the estate is insufficient to pay the debts, the assets, personal as well as real, must be distributed ratably among all the creditors; the petitioning creditor is not entitled to a preference.

A claim for rent under a lease to the lunatic, whether accruing before or after the appointment of a committee, has no intrinsic preference over his other debts, and in the absence of some special equity growing out of the circumstances of the particular case, the landlord comes in simply as a general creditor for the rent unpaid. *Matter of Application of Otis*, 101 N. Y. 580.

The lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of a covenant for quiet enjoyment, and to the extent of such damages they are general creditors, and entitled to have their claim ascertained and paid in due course of administration.

The committee, however, owes no duty to the lessee of specific performance of the lunatic's covenants, and when the estate is chargeable with damages consequent upon their breach, it is entitled to the protection which the law extends to innocence in measuring such damages. *Matter of Strasburger*, 132 N. Y. 128.

The committee of an incompetent person is not liable in his representative capacity for damages to a person falling through a hole in the floor of a building belonging to his incompetent. *Ward v. Rogers*, 51 Misc. 299, 100 Supp. 1058.

An action at law cannot be maintained against the committee in his official capacity upon a contract made by him. *Kent v. West*, 33 App. Div. 112, citing *Rogers v. Wendell*, 54 Hun, 540.

In an action brought upon a contract for the board of a lunatic, evidence as to conversation between the plaintiff and the lunatic, at which the committee was not present, and which did not result in a modification of the contract, is properly excluded. *Lewis v. Mason*, 42 App. Div. 423, 59 Supp. 123.

ARTICLE VIII.

INVENTORY AND ACCOUNT; REMOVAL OF COMMITTEE. §§ 2341, 2342.

§ 2341. *Committee of property; to file inventory of account, 447.*

§ 2342. *Id.; may be compelled to file the same, or render an additional account, etc., 448.*

§ 2341. **Committee of property; to file inventory of account.**

The provisions of article two of title seven of chapter eighteen of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general

guardian of the property; the person with respect to whom he is appointed, is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed, or if he was appointed by the Supreme Court, in the clerk's office where the order appointing him is entered, and, if the incompetent person for whom such committee is appointed has been committed to a state institution, and is an inmate thereof, a duplicate of such inventory, account, and affidavit, shall be filed also by said committee with the superintendent or officer having special jurisdiction over the institution where the incompetent person is confined. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such an incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.

§ 2342. *Id.*; may be compelled to file the same, or render an additional account, etc.

In the month of February of each year, the presiding judge of the court by which the committee of the property was appointed, or, if he was appointed by the Supreme Court, the county judge of the county where the order appointing him is entered, must examine, or cause to be examined under his direction, all accounts and inventories filed by committees of the person and property, since the first day of February of the preceding year. If it appears upon the examination, that a committee, appointed as prescribed in this title, has omitted to file his annual inventory or accounting, or the affidavit relating thereto, as prescribed in the last section; or if the judge is of the opinion that the interest of the person, with respect to whom the committee was appointed, requires that he should render a more full or satisfactory inventory or account, the judge must make an order, requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him. An order so made may be entered and enforced, and the failure to obey it may be punished, as if it were made by the court. Where the committee fails to comply with the order, within three months after it is made, or where the judge has reason to believe that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person with respect to whom the committee was appointed for the purpose of filing a petition in his behalf for the removal of the committee and prosecuting the necessary proceedings for that purpose. The committee may be compelled, in the discretion of the court, to pay personally the costs of the proceedings so instituted. The committee of the property of an incompetent person appointed as prescribed in this title, may at any time in the discretion of the court making such appointment, render to such court an intermediate judicial account of all his proceedings affecting the property of the incompetent person to the date of the filing thereof; and said account shall be then judicially adjusted, determined, and filed; and the same shall be in all respects a final judicial account of the proceedings of said committee affecting said property to that time. Notice of the application for such intermediate accounting shall be given in the manner in which and to the persons to whom notice of application for the appointment of a committee of the person or property of an alleged lunatic, idiot, or habitual drunkard is required to be given by title six of chapter seventeen of the Code of Civil Procedure. The court shall have power and it shall be its duty, to appoint a suitable person special guardian of the incompetent person for the protection of his rights and interests in said proceeding.

Inventory.

CHAUTAUQUA COUNTY COURT.

IN THE MATTER OF THE ACCOUNTING OF
JOHN H. SMITH, COMMITTEE OF HENRY
GORDON AN INCOMPETENT PERSON.

A just and true inventory of the property of Henry Gordon, an incompetent person, on the 1st day of May, 1910, made pursuant to law, by John H. Smith, committee of said incompetent.

The assets of said incompetent in my charge and under my control consist of:

A farm lying in the town of Dunkirk, consisting of one hundred and fifty acres, valued at.....	\$15,000
Stock thereon, valued at (give details of items).....	1,000
Thirty shares of bank stock in First National Bank of Buffalo, worth at par value.....	3,000
Balance of legacy left to Henry Gordon.....	3,500
Farm produce (itemized).....	100
Bond and mortgage on real estate in town of Milton, Monroe county	2,000
A dwelling-house in Dunkirk.....	2,000
Total assets	\$27,500

I have made no investments during the year. I have received the following sums:

From sales of farm produce.....	\$1,000
From interest on bond and mortgage.....	120
From rent on house.....	100
From interest on loan.....	150
From rent of farm.....	1,500
From all other sources.....	500
	\$3,370

I have paid out for support and maintenance of said Henry Gordon, and taxes and insurance..... 2,170

In my hands May 1, 1910..... **\$1,200**

CHAUTAUQUA COUNTY, ss:

John H. Smith, the committee of the person and property of the above-named Henry Gordon, an incompetent person, being duly sworn, doth depose and say, that the foregoing inventory and account contain, to the best of deponent's knowledge and belief, a full and true statement of all his receipts and disbursements on account of said Henry Gordon, and all money and other personal property of the said Henry Gordon which have come into deponent's hands, or have been received by any other person by his order or authority, or for his use since his appointment, and of the value of all such property, together with a full and true account of the manner in which he has disposed of the same, and of all the property remaining in his hands at the time of the filing

of said inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment, and that he does not know of any error or omission in the said inventory or account to the prejudice of the said Henry Gordon.

(Jurat.)

(Signature.)

The committee of an incompetent person may be required to account independently of his annual and voluntary intermediate accountings. *Matter of Arnold*, 76 App. Div. 126, 78 Supp. 772, 12 Anno. Cas. 168.

In proceedings for the settlements of the account of an executor and testamentary trustee, citation having been duly served on an incompetent, who was a necessary party, and on his committee, and the committee having appeared by counsel, the decree was valid though permission was not obtained from the Supreme Court to make the incompetent a party or to serve him with citation. *Meeks v. Meeks*, 51 Misc. 538, 100 Supp. 667; rev'd, 122 App. Div. 461, 106 Supp. 907.

A petition for the removal of a committee should be accompanied by an application for an accounting by him, which should precede the hearing of the motion for his removal, in case his accounts are involved in the grounds alleged. *Matter of Arnold*, 76 App. Div. 126, 78 Sup. 772, 12 N. Y. Anno. Cas. 168.

A proceeding to remove the committee of an incompetent person is a continuance of the original proceeding, and all the parties thereto must be made parties to it. *Matter of Osborn*, 74 App. Div. 113, 77 Supp. 423, 11 N. Y. Anno. Cas. 211, disapproving *Matter of Chapman*, 43 App. Div. 231, 59 Supp. 1025, rev'd on another point, 162 N. Y. 456.

Section 2342 of the Code now constitutes a statutory rule of procedure for the removal of a committee, the observance of which is essential to the regularity of an order of removal. This in no manner impairs the jurisdiction of the court, but merely regulates its exercise. The parties entitled to notice of a proceeding for the appointment of a committee should have notice of the proceeding for his removal, and while the latter proceeding is pending no other proceeding for the removal of a committee can properly be entertained, at least without notice to the parties to the proceeding first instituted. *Matter of Andrews*, 192 N. Y. 514, rev'g 125 App. Div. 457, 109 Supp. 831.

It seems that the annual accounts of the committee of a lunatic may be examined by means of a reference under authority of the Code of Civil Procedure, section 2844. *Matter of De Russy*, 37

St. Rep. 684, 14 N. Y. Supp. 178. See section 2342, as to the examination of the accounts of committee.

Where the committee of an incompetent person, consisting of several members, applying for permission to account, one of their number desiring to resign, no order of reference to pass the account can be granted where neither the incompetent, nor the officer of the institution where she is confined, have been served with notice of the application and where no special guardian has been timely appointed to represent the incompetent on the accounting. *Matter of McCusker*, 32 Misc. 47.

While the proper method of determining a deceased committee's liability to the estate of the lunatic would be by an adjustment and settlement of her accounts, as such, before the proper tribunal, in which proceeding not only her receipts and disbursements could be fully fixed and allowed, but also all her commissions and proper charges for services rendered could be adjusted, where her executor has not only neglected to plead that the action of trover would not lie, but has also neglected to set up that such a proceeding for an accounting was necessary to a full adjustment and determination of her liability, or even ask that such an accounting be had in the action, but after denying's plaintiff's claim, sets up by way of counterclaim sundry items of indebtedness claimed to be due from the lunatic to her, and asks for judgment against the lunatic's estate to that amount, the executor is not entitled to complain of a judgment for plaintiff for the amount found due over and above the counterclaim. *LaGrange v. Merritt*, 96 App. Div. 61, 89 Supp. 32.

The wife of an incompetent person appointed committee of his estate, and authorized to continue his business, which consisted of an interest in an insurance firm, who expended the whole income for the support of herself and her children, having the incompetent committed as a charity patient in a State insane asylum, where he rendered service in the care of other patients, held to be obliged to account in an action brought by his special guardian.

The committee of a lunatic is not entitled to be credited upon her accounting with sums which she has devoted to charity out of the incompetent's income. *Matter of Nutting*, 74 App. Div. 468, 77 Supp. 696.

Leave will not be granted to discontinue proceedings to compel a committee of a deceased lunatic to account upon the application of the administrator in order to enable the latter to begin an action for the same purpose in another court. *Matter of Butler*, 8 Civ. Pro. 56.

The Court of Common Pleas of the city of New York (now abolished) had the powers of a Court of Chancery and jurisdiction over the estate of incompetents.

Under section 2342 of the Code of Civil Procedure said court had power to require the committee of an incompetent to account at any time and to determine whether or not he had performed his duties. The order of said court settling the accounts of a committee is conclusive on the heirs-at-law and next of kin of the incompetent who were notified and appeared without questioning the accuracy of the account or the legality of the proceeding. *Matter of Cowen*, 130 App. Div. 365, 114 Supp. 797.

If the committee neglects to file an inventory or to render his accounts regularly, under oath, in the settlement of his accounts, every intendment will be taken most strongly against him. *Matter of Carter*, 3 Paige, 146; *Matter of Seaman*, 2 Paige, 409. When the committee of a drunkard fail to file the inventories required by law, and do not, at the commencement of the proceedings, disclose all the property they have received, they may properly be charged with one-half of the expenses of the accounting. The committee should not be credited with amounts allowed by them to the inebriate as spending money, subject to abuse by him, nor for an expenditure which it does not clearly appear that the inebriate, if in possession of his faculties, would probably have made himself. The committee should forfeit their commissions on moneys charged to them because its expenditure was improper and subversive of the purposes of their appointment, but such mismanagement furnishes no justification for a refusal to correct a clerical error in their accounts, whereby they have charged, instead of crediting themselves, with a sum of money. *Matter of Stevens*, 13 Wkly. Dig. 567, 23 Hun, 641.

Under the Code, section 2729, items of expenditure may only be allowed without a voucher when the item does not exceed \$20, and the whole amount of such items does not exceed \$500. *Matter of Nutting*, 74 App. Div. 468, 77 Supp. 696.

The committee of a lunatic should be allowed for moneys borrowed by him and expended for the support and maintenance of the lunatic after the personal estate was exhausted. *Matter of Roberts*, 52 Misc. 630, 103 Supp. 1017.

The committee of a lunatic will not be allowed for expenditures made more than six years before filing his petition for an accounting, the Statute of Limitations having run as to the same. *Matter of Roberts*, 52 Misc. 630, 103 Supp. 1017.

Where the estate of a lunatic has been benefited by the services of an attorney employed by the committee to collect a claim, the court has jurisdiction to entertain an application by the attorney for payment, and to order the committee to pay the value of his services from the fund. *Matter of Horton*, 18 Misc. 406, 42 Supp. 775.

Upon the settlement of the account of a committee of the personal property of an incompetent person after his death, the court cannot allow to the late committee, his widow, compensation for her personal care of him during the last three years of his life, while suffering from paresis and unable to take care of himself, as extra compensation as the committee of his property. *Matter of Goff*, 62 Misc. 510, 116 Supp. 650.

Where on an application of the attorney of the committee of an incompetent for an allowance of costs and disbursements the court reduces the gross sum claimed without specifying what items are disallowed or in what proportion they are reduced, parties asserting a right to be paid out of the sum allowed are entitled to have the order resettled so as to state the amounts to be paid by the attorneys to each of them. *Matter of Brenen*, 136 App. Div. 549, 121 Supp. 199.

It is said, in *Matter of Roberts*, 3 Johns. Ch. 43, that a committee of a lunatic is entitled to compensation for his services in receiving and paying out moneys, the same as a guardian or executor, and in *Matter of Livingston*, 9 Paige, 440, that besides actual expenditures and disbursements, the court cannot allow the committee for his personal services any other or greater compensation than that allowed to executors and administrators. But in the *Estate of Colah*, 6 Daly, 51, it was held that the committee was an officer of the court, and in the absence of legislation at that time the court had discretion as to compensation, and \$5,000 was allowed. This was, of course, previous to the enactment of the present section, which regulates the compensation in accordance with the earlier decisions. The power of the court to allow costs and expenses incurred by the committee continues up to the final report of the referee to settle his accounts; the reasonable charges of applications made to the court by the committee for instructions may be allowed as a necessary disbursement. *Matter of Clapp*, 20 How. Pr. 385. An allowance for services cannot be made to one who has acted as an attorney for the lunatic and the committee without notice to the committee. *Matter of Clowes*, 3 Law Bull. 21. The committee of an habitual drunkard who was guilty of gross negligence will be

charged with costs of proceedings for his removal and to procure a settlement of his accounts. *Matter of Carter*, 3 Paige, 146. The committee of a lunatic on a final accounting is entitled to full compensation for receiving and paying out the property without regard to sums disbursed as expenses. The matter of allowing counsel fees is in the discretion of the court. *In re Blossom's Estate*, 7 Supp. 360, 26 St. Rep. 763. The Supreme Court has power to revise or modify the decision of the Court of Common Pleas as to allowances for expenses, etc., made to a committee of a lunatic for the execution of a trust. *Butler v. Jarvis*, 51 Hun, 248, Van Brunt, J., dissenting.

Where the estate of the lunatic is large, the committee may be allowed clerk hire out of the estate. *Matter of Livingston*, 9 Paige, 440; aff'd, without opinion, 2 Denio, 575.

Precedents for petition, notices, appointment of special guardian and orders, in intermediate accounting by committee of the person and estate of an incompetent person. These forms are applicable, with slight changes, to proceedings for the final accounting of a committee.

Petition for Judicial Settlement of Accounts of Committee of Person and Estate of Incompetent Person.

To the Supreme Court of the State of New York:

The petition of Samuel S. Hatt of the city of Albany respectfully shows to this court as follows:

That proceedings were instituted upon the petition of Eveline O. Littell, addressed to this court, and verified on the 18th day of January, 1907, to have Margaret Gray adjudged an incompetent person incapable of caring for herself or her estate, and asking for the appointment of a committee of her person and estate, that such proceedings were had and taken therein, that a commission in the nature of a writ of *de lunatico inquirendo* was issued out of and under the seal of this court on the 26th day of January, 1907, directed to Charles S. Stedman, commissioner, to inquire by a sheriff's jury as to the allegations of the said petition, and that such proceedings were had and taken therein, that upon such inquisition it was adjudged that the said Margaret Gray was incompetent and incapable of managing herself or her estate, and that a committee thereof should be appointed; that, thereafter, said proceedings were duly confirmed by Hon. James A. Betts, justice of the Supreme Court, by order granted on the 16th day of February, 1907, and the said Margaret Gray by virtue of such proceeding was thereupon adjudged to be an incompetent person incapable of caring for herself or her estate, and upon the petition of said Eveline O. Littell, the next of kin, consenting thereto, your petitioner was, on said February 16, 1907, duly appointed the committee of the person and estate of the said Margaret Gray, and thereafter duly qualified as such by giving the bond required by law, and duly approved by this court and entered upon the discharge of his duties as such and still continues to exercise the same.

That the said Margaret Gray is a single person, never having married,

that her father and mother are dead, and that the following are her next of kin and heirs-at-law and reside as follows: (Insert names and addresses.)

All of whom are of full age and sound mind. (If not so state.)

That the United States Fidelity & Guaranty Company of Baltimore, Md., is surety upon the bonds of your petitioner.

That the said Margaret Gray had a nephew, Edward R. Swart by name, whose last known place of residence was Redlands, Cal., but who has not been heard from since on or about the year 1898, and that letters addressed to him since that date, by his brothers, Jacob H. Swart and Franklin O. Swart, have been returned unopened, and that, as your petitioner is advised by the said Jacob H. Swart and Franklin O. Swart, he is believed to be dead, and your petitioner alleges that he is presumptively dead.

That the said Margaret Gray is a resident of the county of Albany, N. Y., but is temporarily sojourning with her niece, said Eveline O. Littell, at West Haven, Conn.

That your petitioner is desirous of rendering an account of his proceedings as committee of the person and estate of said Margaret Gray, and prays that his said accounts be passed upon and judicially settled by this court, and that notice of the application for such accounting shall be given in the manner and to such persons, as the court may direct, and pursuant to the statute in such case made and provided, and that a suitable and proper person be appointed the special guardian of the incompetent person for the protection of her rights and interests in said proceeding, and that your petitioner may have such other and further order and relief as to the court may seem meet and proper, and your petitioner will ever pray.

SAMUEL S. HATT.

Dated, Albany, N. Y., *August 1, 1907.*

(Verification.)

Order that Notice of Application of Committee to Render Account, etc., be Given to Parties Interested.

(Caption and title.)

On reading and filing the petition of Samuel S. Hatt, as committee of the person and estate of Margaret Gray, an incompetent person, dated and verified on the 1st day of August, 1907, whereby it appears among other things that the said Samuel S. Hatt is desirous of having his accounts, as committee of the person and estate of said Margaret Gray, under order of appointment of date of February 16, 1907, passed, allowed and judicially settled, and praying that notice of application for such accounting shall be given in such manner, and to such persons as the court may direct and the statute provides and wherein and whereby it appears that the said Margaret Gray, said incompetent, is a resident of the county of Albany, N. Y., but is sojourning temporarily with her niece, Eveline O. Littell, at West Haven, Conn., and that the only heirs-at-law and next of kin of said Margaret Gray are: (Name parties in interest.)

from which it also appears that said Eveline O. Littell, Jacob H. Swart and Conrad G. Oliver are non-residents of the State of New York, residing as follows: (Give residence.)

That the United States Fidelity & Guaranty Company of Baltimore, Md., is surety on the bonds of the petitioner.

Now on motion of Edward S. Coons, attorney for said petitioner, it is ordered:

That presentation of the application for such accounting be made at a Special Term of the Supreme Court of the State of New York, to be held at the City Hall, in the city of Albany, N. Y., on the 24th day of August, 1907, at the opening of the court on that day or as soon thereafter as counsel can be heard, and that notice of presentation of such application shall be given to the said Margaret Gray and to the said kin of Margaret Gray above named and to the United States Fidelity & Guaranty Company by service of a copy of this order and of the notice of presentation of such application for said accounting, at least fifteen days before said August 24, 1907, upon the said Margaret Gray, personally, without the State, and likewise upon said Eveline O. Littell, with whom said Margaret Gray is temporarily sojourning, and upon (names of other parties), respectively, personally, or by leaving the same at their last-known places of residence within the State of New York, and upon the said Eveline O. Littell, Jacob H. Swart and Conrad G. Oliver, by mail, by depositing the same in the post-office at Albany, N. Y., contained in a securely closed post-paid wrapper, directed as follows: (Names and addresses of non-residents.)

GEORGE H. FITTS,
Justice Supreme Court.

Dated, *August 1, 1907.*

Notice of Application of Committee for Leave to Render Account, etc.

(Title.)

TAKE NOTICE, That pursuant to the order of Hon. George H. Fitts, justice of the Supreme Court therefor, of which the within is a copy, notice is hereby given of the presentation of the application for the accounting of Samuel S. Hatt as committee of Margaret Gray, pursuant to the terms of said order, to be made to the Special Term of the Supreme Court of the State of New York, to be held at the City Hall in the city of Albany on the 24th day of August, 1907, at the opening of the court on that day or as soon thereafter as counsel can be heard, and that an application will then and there be made that the prayer of the said petition be granted, and said Samuel S. Hatt, as such committee, be permitted to make, render and file accounts of his proceeding, as such committee, and the same be passed upon and judicially settled by the court, and that a suitable and proper person be appointed the guardian of said Margaret Gray in said proceeding, and for such other and further relief as to the court may seem meet and proper.

EDWARD S. COONS,

Dated, Albany, N. Y., *August 1, 1907.* *Attorney for Petitioner.*
To parties interested, including surety company.

Order Authorizing Committee of Incompetent Person to Render Account.

(Caption and title.)

On reading and filing the petition of Samuel S. Hatt, as committee of the person and estate of Margaret Gray, an incompetent person, dated and verified the 1st day of August, 1907, praying that he be permitted to make, render and file accounts of his proceedings as such committee, that the same be judicially passed upon and settled by this court, and that a suitable person be appointed guardian of said Margaret Gray in said proceeding, and on reading and filing the order

granted by Justice George H. Fitts herein on August 1, 1907, that the presentation for the application for such accounting be made at this term, and on reading and filing notice, under date of August 1, 1907, of the presentation of the application for such accounting at this term, time and place, with due proof of service of said order and notice, pursuant to the terms and provisions of said order, upon all persons and in the manner prescribed in said order.

Now, on motion of Edward S. Coons, attorney for said petition, it is

Ordered, That the prayer of the petitioner be granted, and that the said Samuel S. Hatt, as such committee, be, and he hereby is, permitted authorized and directed to render and file his accounts of proceeding, that the same may be passed upon, and judicially settled, by this court.

Enter.

GEORGE H. FITTS,
Justice Supreme Court.

Order Appointing Special Guardian for Incompetent Person.

(Caption and title.)

On reading and filing the petition of Samuel S. Hatt, as committee of the person and estate of Margaret Gray, an incompetent person, dated and verified the 1st day of August, 1907, praying that he be permitted to make, render and file accounts of his proceeding as such committee, that the same be judicially passed upon, and settled by this court, and that a suitable person be appointed guardian of said Margaret Gray in said proceeding, and on reading and filing the order granted by Justice George H. Fitts, herein, on August 1, 1907, that the presentation for the application of such accounting be made at this term, time and place, and on reading and filing notice under date of August 1, 1907, of the presentation of the application for such accounting at this term, time and place, with due proof of service of said order and notice, pursuant to the terms and provisions of said order, upon all the persons and in the manner as prescribed in said order.

Now on motion of Edward S. Coons, attorney for said petitioner, it is,

Ordered, that Lucius H. Washburn of the city of Albany, N. Y., a competent and responsible person, be, and he hereby is, appointed the guardian *ad litem* of said Margaret Gray in this proceeding, he having presented to and filed with this court his consent so to act, duly acknowledged, and affidavit as to his responsibility, pursuant to the statute in such case made and provided.

JOHN FRANEY,
Clerk.

(Title.) **Consent of Special Guardian.**

I, LUCIUS H. WASHBURN, of the city of Albany, N. Y., hereby consent to become the guardian *ad litem* of Margaret Gray in the proceeding mentioned in the petition herein, and duly appointed as such by order of the court made at the date hereof.

Dated, Albany, N. Y., August 24, 1907.

(Acknowledgment.)

LUCIUS H. WASHBURN.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

Lucius H. Washburn, being duly sworn, says, that he is the person duly appointed by the court as guardian of Margaret Gray, an incompe-

tent person; that he is of sufficient ability to answer to the said Margaret Gray for any damage that may be sustained by his negligence or misconduct in the defense of said proceeding, being worth the sum of one thousand dollars (\$1,000) over and above debts and liabilities owed or incurred by him, and exclusive of property exempt by law from execution.

LUCIUS H. WASHBURN.

Sworn to before me, this 24th
day of August, 1907.

ANNA S. CASE,

Com. of Deeds, Albany, N. Y.

(Title.)

Report of Special Guardian.

I, LUCIUS H. WASHBURN, counsellor-at-law, practicing at the city of Albany, N. Y., having been duly appointed special guardian of Margaret Gray, the above-named incompetent, for the purpose of appearing for and protecting her interest in the above-entitled proceedings, do hereby report as follows:

FIRST: That the interest of said Margaret Gray is, that she is the sole owner of the property mentioned and described in the account of proceedings made and filed by Samuel S. Hatt, her committee.

SECOND: That I have examined the papers, including the petition of said committee, dated and verified August 1, 1907, praying for the judicial settlement of his accounts, the order thereof dated on that day, directing service of notice and order and the proofs of service herein; the account of proceedings and the proposed decree, the vouchers, securities, and other papers belonging to the estate.

THIRD: I do further report that there is no valid objection on the part of said Margaret Gray to the entry of a decree herein, settling the accounts of the said Samuel S. Hatt, committee under orders of appointment of date of June 30, 1906, and February 16, 1907, as rendered and filed by him.

LUCIUS H. WASHBURN,

Dated, August 31, 1907.

Special Guardian.

The account of the committee should be in substantially the form of an account rendered by an executor on final accounting in Surrogate's Court, such schedules being prepared only as are necessary to show clearly the receipt and payment of moneys by the committee.

Order Judicially Settling Accounts of Committee of Incompetent Person.

(Caption and title.)

Samuel S. Hatt of the city of Albany, Albany county, N. Y., the duly qualified and acting committee of the person and estate of the above-named Margaret Gray, having been duly appointed such committee by an order of this court, dated February 16, 1907, and the said Samuel S. Hatt having applied to this court by petition, verified the 1st day of August, 1907, praying for a judicial settlement of his accounts as such committee, and the said court having made an order on said August 1, 1907, that notice of the presentation of such application should be given to (name parties) heirs-at-law and next of kin of said Margaret Gray, and to the United States Fidelity & Guaranty Company, security on the bond of said committee, in the manner and within the time, as prescribed in said order, and that such application be made at a Special

Term of this court, to be held at the City Hall, Albany, N. Y., on August 24, 1907, and on said August 24, 1907, at said term, time and place, said committee having appeared in person and by Edward S. Coons, of counsel, and filed notice of application for such accounting in behalf of said petitioner, with proof of service thereof upon all of said aforementioned parties in the manner and within the time specified in said order; and no one appearing in opposition thereto, or otherwise, and upon motion, Lucius H. Washburn having been duly appointed the special guardian of said Margaret Gray in the said proceeding, and he having duly filed with the court his consent so to serve, duly acknowledged, and the usual affidavit of pecuniary responsibility and having duly qualified as such guardian, and said Samuel S. Hatt, as such committee, having filed his accounts of proceedings duly verified with the vouchers in support thereof, and said accounts and vouchers having been examined by said guardian and found correct, and the matter coming on now to be heard, Edward S. Coons appearing as counsel for said petitioner and Lucius H. Washburn appearing in person as the special guardian, duly appointed for and on behalf of the said Margaret Gray, with respect to this accounting, the next of kin not appearing, and after hearing due proof and examining the accounts presented by said committee herewith, and vouchers in support thereof, it is

Ordered and decreed, that the said accounts thus rendered and presented by the said Samuel S. Hatt, committee, be, and the same are hereby, finally and judicially settled, passed and allowed according to the final summary statement.

The said committee is charged as follows:

With the amount of the invested funds which came originally into his hand	\$11,023 41
With the appraised value of other property.....	293 35
With the amount of increase as per exhibit "A".....	571 21
Total	<u>\$11,887 97</u>

The said committee is credited as follows:

With property remaining unsold as per schedule "B".....	\$250 85
With amount of schedule "C".....	4,482 88
Leaving in his hands the balance of	<u>7,154 24</u>

It is further ordered and decreed, that out of the said sum of \$7,154.24, thus in his hands, said committee pay to himself the sum of \$217.11, hereby allowed to him as and for his commissions for receiving and paying out according to the statutes in such cases made and provided.

It is further ordered and decreed, that the matter of allowance to the committee, for his service as committee of the person of the said Margaret Gray, be held in abeyance until the final accounting, and

It is further ordered and decreed, that out of the fund now in his hand, said committee pay to Lucius H. Washburn, as special guardian herein, the sum of \$25, as, and for an allowance of costs, hereby allowed him under the provisions of the Code of Civil Procedure; and to Edward S. Coons, the sum of \$200, hereby allowed said committee, as and for counsel fees and other expenses of this accounting, under the provisions of the Code of Civil Procedure, and \$35.91, for disbursements accrued in making service of the notice and order of the presentation of the application for this accounting.

It is further ordered and decreed, that the amount remaining in the hands of said committee, after making said payments, hereinbefore directed, to wit, the sum of \$6,676.22, is to be taken as a basis for any future accounting of the said Samuel S. Hatt, as committee, etc.

Enter.

GEORGE H. FITTS,
Justice Supreme Court.

ARTICLE IX.

WHEN PROPERTY RESTORED TO LUNATIC.

§ 2343. Property, when to be restored.

Where a person, with respect to whom a committee is appointed, as prescribed in this title, becomes competent to manage himself or his affairs, the court must make an order, discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property, remaining in the committee's hands. Thereupon the property must be restored accordingly.

The court will not restore the estate and discharge the committee of an habitual drunkard, except upon proof of a permanent restoration; there should be a year's voluntary and total reformation. *Matter of Hoag*, 7 Paige, 312. A petition by a lunatic to supersede a commission may be referred, or he may be examined by the court. *Matter of Hanks*, 3 Johns. Ch. 567. Where, after a committee has been appointed, the mind of the lunatic has been restored in part, the court may discharge the proceedings against him partially, so far as to enable him to make a will under judicial supervision, with leave to revoke it wholly without such sanction, retaining, however, control of his property so far as is necessary to protect it. *Matter of Burr*, 2 Barb. Ch. 208. Where committees both of the person and estate have been appointed, the former will not be discharged on the petition of the lunatic, alleging that he is so far restored to reason as to be able to govern himself, if it does not appear that he is yet competent to manage his estate, if no application is made to discharge the committee of his estate.

The petitioner, having formerly been adjudged an incompetent person, alleged that he had recovered the use of his faculties and asked that the committee of his person and property be discharged, and upon the reference of his petition, without appearing in person, presented the testimony of physicians who had examined him, and of others as to his present mental condition; *held*, that the referee was right in denying an application by the opponents to direct the petitioner to submit to an examination by physicians named by them, to enable them to testify; but that the petitioner should be called before the referee and be examined in their presence; or an examination by physicians agreed upon by both parties should be had.

Matter of Newcomb, 58 App. Div. 338, 68 Supp. 988, aff'g 33 Misc. 417, 68 Supp. 418.

The practice that should be adopted for the determination of an application for a supersedeas under section 2343 is largely within the discretion of the Supreme Court. The Appellate Division has the power to review the discretion exercised by the Special Term, but this court is limited in its jurisdiction to the review of questions of law, and, therefore, cannot review the discretion of the Appellate Division. *Matter of Curtiss*, 199 N. Y. 36, aff'g 137 App. Div. 584.

Conservators of the person and estate of an incompetent person who were appointed by the Probate Court of another State of which she was then a resident were, on their application, appointed a committee of her property in this State, in which proceeding it was also adjudged that the incompetent person was a resident of another State. Subsequently upon a petition *de lunatico inquirendo* a commission was appointed by the Special Term to inquire whether such person was incompetent to manage her affairs. *Held*, that the question presented is whether she has gained such a residence here, since the former proceeding, as would entitle her to apply to the courts of this State for a supersedeas, and the Appellate Division having determined that she is still a resident of another State, such application should be made to the courts of that State. *Matter of Curtiss*, 199 N. Y. 36, aff'g 137 App. Div. 584.

It seems that under section 2343 the Supreme Court has authority to make an order discharging the committee, although it was appointed by the Court of Common Pleas. *Butler v. Jarvis*, 51 Hun, 252, 4 Supp. 138. It seems that the provisions of section 2343, for the discharge of the committee when the person subject to the commission becomes "competent to manage his affairs," does not mean competency to manage a large estate, if the person happens to possess one. The test of a man's right to be restored to the control and possession of his property is not competency to manage a large estate, but his restoration to mental health and his fitness for the common and ordinary affairs of life. *Matter of Brugh*, 61 Hun, 197, 16 Supp. 551, 40 St. Rep. 573. See this case for tests for recovery of sanity as approved by the court.

After the committee has been discharged on the lunatic's recovery the court has no further jurisdiction over the property of the former lunatic, except to pass upon the accounts of the committee. Thus the court cannot compel the restoration of property by one to whom it has been transferred by the former lunatic after the committee

has been discharged. *Matter of Dowd*, 19 Misc. 688. Section 2343 applies only to the recovery of the lunatic and not to his death. Therefore, the court has no power after the death of lunatic to supersede the commission of lunacy on the ground that the lunatic has been restored to reason. *Matter of Owens*, 44 St. Rep. 307. In proceedings for the supersedeas of a commission of the lunatic the manner of determining the question as to the sanity of the lunatic is in the discretion of the court. The supposed lunatic has no right to have the question of his lunacy submitted to a jury, and the court may determine it either upon affidavits, or personal examination of witnesses, or by sending it to a referee to take evidence and report, or by trial before a jury. *Matter of Blewitt*, 138 N. Y. 149, 51 St. Rep. 844.

The committee of an incompetent person is entitled to be allowed his reasonable expenses incurred in good faith in opposing proceedings taken for the discharge of the committee on the ground the incompetent had completely recovered his mental health and on habeas corpus, in which decisions adverse to the petitions were rendered. *Matter of Larner*, 39 Misc. 377, 79 Supp. 836.

The application for the release of an incompetent, committed in consequence of alcoholism, was made by an attorney, upon her written request and upon a petition signed by her private attorney, in pursuance of an understanding at the time she was committed that if she subjected herself to restraint for one year such an application should be made. The application having been made in good faith, and on advice of competent experts, though unsuccessful, *held*, that the attorney should be paid for his services from the property of the incompetent, although the committee did not join in the application, he being made a party to the proceeding. *Matter of Larner*, 68 App. Div. 320, 74 Supp. 70; *modif'd* so as to require proceedings to be remitted, 170 N. Y. 7.

The court has power, on an application to supersede the commission, where reasonable grounds appear, to inquire whether the lunacy still continues, and even in a doubtful case to direct the inquiry; it may also, in its discretion, make the reasonable costs and expenses a charge upon the lunatic's estate, and this, although the traverse prove unsuccessful. *Carter v. Beckwith, et al.*, 128 N. Y. 312.

Where the estate of a lunatic has been benefited by the services of an attorney employed by the committee to collect a claim, the court has jurisdiction to entertain an application by the attorney

for payment, and to order the committee to pay the value of his services from the fund. *Matter of Horton*, 18 Misc. 406, 42 Supp. 775.

Precedent for Order Discharging Committee.

At a term of the County Court held at the courthouse in the city of Kingston, Ulster county, N. Y., July 15, 1911:

Present: — Hon. CHARLES F. CANTINE, *County Judge of Ulster County*.

IN THE MATTER OF RICHARD ROSS, AN
HABITUAL DRUNKARD.

On reading and filing the petition of Richard Ross, above named, dated June 20, 1911, setting forth that he has been habitually temperate in the use of ardent spirits for twelve months past, and praying for the discharge of his committee, W. S. Fredenburgh, heretofore appointed in the above matter, and for the restoration of his property, and on reading and filing the affidavits of John Smith and Hiram Roe, dated, respectively, May 29, 1911, and May 26, 1911, in support of said petition, and upon examining the said Richard Ross, in open court, as to his habits, etc.:

It is hereby *ordered*, on motion of V. B. Van Wagenan, Esq., counsel for said Richard Ross, that the said committee, W. S. Fredenburgh, heretofore appointed herein committee of the person and estate of said Richard Ross, be and he is hereby discharged, and that he restore to said Richard Ross the property remaining in his hands belonging to the said Richard Ross, after deducting the legal charges and expenses of the said committee.

CHARLES F. CANTINE,
County Judge of Ulster County.

ARTICLE X.

DEATH OF LUNATIC. § 2344.

§ 2344. *Id.*; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. The committee may, in such case, render to the court by which he was appointed, a final account of his proceedings touching the property of the incompetent. Such account shall contain an inventory in the form prescribed by subdivision one of section twenty-eight hundred and forty-two of this act and a full and true account in form of debtor and creditor of all his receipts and disbursements; and there shall be appended thereto an affidavit of the committee in the form prescribed by section twenty-eight hundred and forty-three of this act and there shall be filed therewith a voucher for every payment except in one of the cases specified in section twenty-seven hundred and twenty-nine of this act. Notice of the application for settlement of such account shall be given in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and, if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. And such account shall be judicially settled, adjusted and determined.

Upon the death of a lunatic, the powers and duties of his committee cease; any legal claims against the estate can thereafter only be enforced in the manner furnished by law. *Matter of Beckwith*, 87 N. Y. 503.

Section 2344 of the Code of Civil Procedure, providing that upon the death of an incompetent "the power of the committee ceases and the property of the decedent must be administered and disposed of as if a committee had not been appointed," does not relieve the committee of a deceased incompetent from his duty to account in a legal proceeding.

The Supreme Court has inherent jurisdiction of an action by the committee for that purpose, although the Revised Statutes and the Code of Civil Procedure authorize a proceeding by petition for the discharge of a trustee. *Downing v. Whitney*, 46 App. Div. 307, 61 Supp. 540.

Where a lunatic has died and an administratrix is appointed pending suit instituted by the lunatic's committee to obtain possession of money, a trustee will be appointed to carry on the litigation. *Killick v. Monroe County Sav. Bank*, 1 Supp. 501, 17 St. Rep. 283. Where no executor or administrator is appointed over a lunatic's estate upon his death the committee may apply to the court for his discharge, on giving notice to the heirs and next of kin. Upon such discharge the committee should be allowed payments made by him before his appointment for claims against the lunatic and for sums expended in the support of the lunatic's children. *Matter of Forkell*, 8 App. Div. 397. But such allowance should be passed upon by the court appointing the committee, and should not be determined in a proceeding to compel payment to the committee of an award for the lands of the lunatic taken in condemnation proceedings. *Matter of Board of Street Opening*, 89 Hun, 527, 69 St. Rep. 796.

By virtue of section 2344 the property of the lunatic upon his death is administered as if no committee had been appointed, and the estate of the deceased incompetent is turned over to the executor or administrator and the debts of the estate are paid by such executor or administrator. *Matter of Dowd*, 19 Misc. 690. Although the lunatic has died, a person whose deed has been invalidated by an inquisition will be permitted to traverse the inquisition. *Matter of Owens*, 44 St. Rep. 307.

Since no title to the property of a lunatic passes to his committee, and until his accounts are closed and the funds handed over, he

and the fund remain under the control of the court, the fact that the lunatic has died and the committee has been appointed administrator of his estate is not available to the sureties on the bond of the committee to exonerate them from liability on the ground that their title passed to their principal as administrator. *Forbell v. Denton*, 53 App. Div. 402, 65 Supp. 1120.

It seems, that during the existence of the commission, the jurisdiction to award costs and expenses may only be invoked on petition or motion.

As, however, upon the death of the lunatic the power of the committee *ipso facto* terminates and his real and personal property passes in the same manner as if he had been of sound mind and memory, the jurisdiction of the court to summarily administer his estate then ceased and all claims against the estate, including claims for such costs and expenses, must be adjusted and settled in the ordinary course of administration. *Carter v. Beckwith et al.*, 128 N. Y. 312.

A person who had been adjudged incompetent died while the court had under consideration a petition for the payment out of the funds in the hands of the committee the necessary disbursements of the petitioner and his costs and counsel fees under Code, section 2336. *Held*, that the court had power to have the incompetent person's executor brought into the proceeding and to continue the same, the disbursements, etc., being a charge upon the funds and not an ordinary claim against the estate. *Matter of Ferris*, 86 App. Div. 559, 84 Supp. 15; *aff'd*, 176 N. Y. 607. Where a lunatic died before the confirmation of the inquisition, the court has jurisdiction to order the costs and expenses of the proceedings to be paid out of the estate. *Matter of Lofthouse*, 3 App. Div. 140.

ARTICLE XI.

PROCEEDING TO COMPEL PERFORMANCE OF CONTRACT MADE BY AN INCOMPETENT PERSON. § 2344a.

Section 2344a was added by chapter 65, Laws of 1909. As its purpose is analogous to that of sections 2345, 2346, and 2347, it is collated with those provisions in proceedings for the disposition of the real estate of an infant, idiot, or habitual drunkard.

ARTICLE XII.

APPLICATION FOR COMMITMENT OF INSANE PERSON TO STATE HOSPITAL NOT A SPECIAL PROCEEDING.

An application for the commitment of an insane person to the State hospital brought under chapter 545, Laws of 1896, as amended,

is not a special proceeding as defined by section 3334 of the Code. The proceeding is one for the protection of the alleged lunatic and for the protection of society. The petitioner neither gains nor loses by order entered therein. No right is enforced, no wrong is redressed, no public offense is punished, and the appeal therein is not an appeal as from a final order in a special proceeding. *Matter of Murtaugh*, 117 App. Div. 302, 102 Supp. 176.

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ARTICLE I.

NATURE AND EXTENT OF THE POWER.

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Subd. 1. Definition and Origin of Power.

“Eminent Domain is defined to be the right of a State to take private property for public use on payment of compensation.” *Randolph on Eminent Domain*, § 2, citing *Vattel, Law of Nations*, § 244; *Grotius, Rights of War and Peace*, book 3, chap. 20, § 7, to the following definition: “The property of the subject is under the dominion of the State; so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the State is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute.”

Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual upon just compensation paid to him. *Am. & Eng. Enc. Law.*, vol. 10 (2d ed.), p. 1047.

“The right of every government to appropriate, otherwise than by taxation and its police authority . . . private property for public use.” *Dillon, Mun. Corp.* (4th ed.), § 584.

Eminent domain is the right of the nation or the State, or of those to whom the power has been lawfully delegated to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law. *Cyc.*, vol. 15, p. 557.

The right of eminent domain is the right of the State to take, at any time, the private property of any citizen for public use upon making just compensation. *Matter of Simmons*, 58 Misc. 581.

It is said in *Cherokee Nation v. Southern Kansas R. R.*, 135 U. S. 641, that "lands held by private owners everywhere within the geographical limits of the United States are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it." And the United States has, under the right of eminent domain, condemned property for military purposes, water supply, post-offices, coast survey, lighthouses. *United States v. Chicago*, 7 How. (U. S.), 185.

Each State has the right of eminent domain by virtue of its statehood, whether that statehood be self-created by treaty or confirmed by Federal authority. *Huse v. Glover*, 119 U. S. 543; *Illinois Central R. R. v. Illinois*, 146 U. S. 387.

The eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the Constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency of the State is concerned, as where the land of the individual is wanted for a road, canal, or other public improvement. The only restriction upon this power, in cases where the public or the inhabitants of any particular section of the State have an interest in the contemplated improvement as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, Ch. 73.

In *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100, Mason, J., delivering the opinion of the court, says: "Common-law right of eminent domain has ever been regarded as a high prerogative of sovereignty to be exercised whenever the public necessity required. And this right is impliedly admitted both in the Constitution of the State and of the United States. It belongs to the legislative power of the government to determine for what public purposes private property shall be taken, and the necessity or expediency of such appropriation."

The right to exercise the sovereign power of the people was vested in

the legislative body, whose acts are supreme, when confined within the limits fixed by the Constitution of the State. An eminent dominion over all property in the State is an incident of the sovereign power. Where its exercise affects the property of the private citizen, it is restricted by the Constitution only in the feature that compensation must be made for its taking. The right of the State to take the property, however, is an absolute and inherent one. It is an attribute of political sovereignty, and the constitutional provision only operates upon the mode of exercise of the right. *People v. B. & O. R. R. Co.*, 117 N. Y. 150, 155.

The taking of private property for public use can only be justified by virtue of the sovereign right of eminent domain.

Before the organization of our government, this right was exercised throughout the civilized world, and its exercise restricted to cases of public necessity and just compensation.

The provisions on this subject in the Constitutions of the United States and of the State of New York are only declaratory of a previously existing universal principle of law. *People v. Hugh White*, 11 Barb. 26.

The Constitution of the United States cannot be so construed as to take away the right of eminent domain from the States; nor does the exercise of such right interfere with the inviolability of contracts. All property is held by tenure from the State and all contracts are made subject to the right of eminent domain. *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507.

Eminent domain, or the right to resume the possession of private property for the public use, upon paying a just compensation therefor, remains in the government or the people in their sovereign capacity. *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 13.

The power of eminent domain is the right of the State as sovereign to take private property for public use upon making just compensation. The State has all the power of eminent domain there is and all that any sovereign has, subject to the limitations of the Constitution. *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 237.

Subd. 2. Extent of and Limitations upon the Power.

No prerogative of sovereign power should be watched with greater vigilance than that which takes private property for public use. It should never be exercised, except when the public interest clearly demands it, and then cautiously; and the requirements of the statute authorizing its exercise must be strictly pursued. *Dyckman v. The Mayor, etc., of New York*, 5 N. Y. 434, 438.

The power of eminent domain which resides in the State as an attribute of sovereignty is nevertheless dormant until called into exercise by an act of the Legislature. Until a statute authorizes an exercise of the

power, it is latent and potential merely, and not active or efficient, and the State can neither exercise the prerogative, nor can it delegate its exercise, except through the medium of legislation. Therefore it is that wherever an attempt is made either by the officers of the State or by a corporation organized for a public purpose to take private property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for the appropriation. *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 490.

The exercise of the power of eminent domain by the State cannot be limited. *Adirondack R. Co. v. Indian River Co.*, 27 App. Div. 326, 50 Supp. 245, 84 St. Rep. 245.

The fundamental right to condemn private property for public use depends upon public necessity which is a *sine qua non* to the taking. *People ex rel. Hollock v. Purdy*, 72 Misc. 122.

As the exercise of this power is in derogation of individual rights it should be allowed only when the necessity clearly appears, and the proposed use is clearly embraced within the legitimate objects of the power. *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251.

In exercising the power of eminent domain the statute must be strictly followed. *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *In re City of Buffalo*, 68 N. Y. 171.

Where power is delegated by the Legislature to take the property of a citizen, all the prescribed prerequisites to the exercise of that power must be strictly observed and conformed to. It cannot be presumed that these requirements have been met. *Matter of City of Buffalo*, 78 N. Y. 362.

It is within the power of the Legislature to authorize lands to be condemned for public use, to determine what estate shall be taken, and to authorize the taking of any fee or vested estate in its discretion. *Matter of City of Rochester*, 24 App. Div. 383, 48 Supp. 764.

The use must be public. *Embury v. Connor*, 3 N. Y. 511; *Buffalo & N. Y. R. v. Brainard*, 9 N. Y. 100; *People v. Smith*, 21 N. Y. 595.

So long as the intended use of an improvement is not restricted to private parties or private interests, but is open to the whole, it is no valid objection to an exercise of the right of eminent domain that it will benefit one person, or some class of persons, more than others. *Matter of Burns*, 155 N. Y. 23, rev'g 16 App. Div. 507, 44 Supp. 930.

But a contemplated possible limited use by a few, and not then as a right, but by way of permission or favor, it not a public use, and so is not sufficient to authorize the taking of private property against the will of the owner. *Matter of the Application of the Split Rock Table Road Co.*, 128 N. Y. 408.

There is nothing in the past political history of the State which would justify laws, by which a citizen may be authorized to take the property of his neighbor by the exercise of the right of eminent domain, for a purpose which is primarily for his private benefit, although incidentally, of such possible benefit generally, as any improvement of agricultural lands would result in. *Matter of Tuthill*, 163 N. Y. 133, aff'g 36 App. Div. 492, 55 Supp. 657.

Statutes are strictly construed as to interest authorized to be taken. *People v. Common Council, etc., of Gloversville*, 128 App. Div. 44, 112 Supp. 387.

The necessity need not be absolute, a reasonable necessity being all that is required. *People v. Fisher*, 190 N. Y. 468, aff'g 116 App. Div. 677, 101 Supp. 1047.

No municipality or other corporation has an inherent right to take lands by eminent domain, that being an attribute of sovereignty belonging to the State, and the Federal government has no right to interfere with the conditions which the State may impose upon the exercise of the power.

The only restrictions put upon the Legislature in the exercise of the power of eminent domain are that the use must be public and compensation be given. When the compensation is not made by the statute, it must be ascertained by a jury or by not less than three commissioners appointed by a court of record.

As the Legislature in delegating its power of eminent domain is not bound to act uniformly or in accordance with any particular rule, it may impose any condition on the grant of the power, whether precedent or subsequent, which it believes to be equitable. Hence, statute giving to owners of lands which are depreciated in value by the construction of an additional water supply for the city of New York a right to compensation does not violate the Constitution. *People ex rel. Lasher v. City of New York*, 134 App. Div. 75, 118 Supp. 742.

The right of eminent domain is an attribute of sovereignty which the State may grant or withhold at its will. When it delegates that right it may impose upon the donee any condition that does not encroach upon or abridge any of the constitutional rights of those whose property is to be taken. It may require the donee of the right to do more than is demanded by the Constitution, but it may not permit less to be done. If the donee accepts the rights and exercises it, the conditions subject to which it is granted cannot be evaded or ignored. *People ex rel. Burhans v. City of New York*, 198 N. Y. 439, aff'g 134 App. Div. 75.

The taking of private property for private purposes cannot be authorized even by a legislative act, and the fact that the structure intended to be built thereon intends incidentally to benefit the public by conferring additional accommodations for business is not sufficient, if the structures

are to remain under private ownership and control, and no right to their use or their management is conferred upon the public. *Matter of Eureka Ware House Co.*, 96 N. Y. 42.

In condemnation proceedings by a private corporation an unqualified fee of real property cannot be taken without express authority. In all cases where private property is taken for public use, the extent and quality of the interest taken should be measured by public convenience and necessity. *Hudson & Manhattan R. R. Co. v. Wendel*, 193 N. Y. 166, aff'g 122 App. Div. 917.

Private property cannot be taken by eminent domain for private use. Hence, a motion made under section 20 of the Railroad Law by a private manufacturing corporation for permission to construct a railroad switch upon a public highway for petitioner's private use will be denied where the plan includes the condemnation of lands belonging to private owners not included in the highway as well as easements in the highway owned by the abutting owners by reason of the fact that they own the fee of the highway.

The easement of an abutting owner in a public street is private property and cannot be condemned except for public use.

Section 20 of the Railroad Law, in so far as it assumes to authorize the taking of private property for private uses, is unconstitutional and void. *Matter of Sweet Manufacturing Co. v. Van Der Hoof*, 137 App. Div. 492, 121 Supp. 842.

Statutes authorizing the taking of land may not be extended by implication, and no greater right is acquired than is necessary to satisfy the purpose of the statute. *Leffman v. Long Island R. R. Co.*, 120 App. Div. 528, 105 Supp. 487, rev'g 47 Misc. 169, 93 Supp. 647.

To justify the taking of land for railroad purposes *in invitum* the owner, not only the necessity for the land must exist, but that necessity must be recognized by statute and be provided for in some plain grant of power, and when the right to exercise the power is claimed, the corporation must make out a case within the statutory delegation of power. *Erie Railroad Co. v. Steward*, 170 N. Y. 172, aff'g 61 App. Div. 480.

The Legislature has no power by special act to authorize the sale of the property of parties, for other than public purposes, without their consent, and the facts which would create a necessity for the exercise of such power will not be presumed when neither shown by proof, nor recited in the act. *Powers v. Bergen*, 6 N. Y. 358.

The Legislature has power to determine what estate shall be taken by the State in land required for public purposes, even if the public use is special and not necessarily permanent. *Eldridge v. City of Binghamton*, 120 N. Y. 309.

Generally, whether the use to which private property may be devoted by legislative power is in fact public or private is a judicial question, and the courts are not concluded by any declaration of the law-making power, as to the nature of the use. *The Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345.

It is held in the *Matter of Application of the Niagara Falls & Whirlpool Co.*, 108 N. Y. 375, that the question as to whether the uses to which property is sought to be put are in fact public, so as to exercise the right of eminent domain, is a judicial one to be determined by the courts. So long as the intended use of an improvement sought to be accomplished through an exercise of a right of eminent domain is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection to the act authorizing it, that it will benefit one person or some class of persons more than others, or that it originated in private interests and was intended in some degree to subserve private purposes. *Matter of Petition of Burns*, 155 N. Y. 23.

After the Legislature has authorized the taking of property for public use upon certain conditions, it cannot abolish such conditions and act as if none had been attached. *Matter of Southern Boulevard R. R. Co.*, 58 Hun, 497, 35 St. Rep. 550, 12 Supp. 466.

In proceedings to condemn land under the right of eminent domain a true criterion by which to judge of the character of the use is to determine whether the public may enjoy it by right or only by permission (*Matter of Split Rock Cable Co.*, 58 Hun, 351; *aff'd*, 128 N. Y. 408); where it is held that a contemplated possible use by a few and not then as a right, but by way of permission or favor, is not a public use sufficient to authorize proceedings for condemnation.

Where the Legislature has conferred upon a corporation or municipality the general power to acquire lands by the right of eminent domain, such power does not extend to lands already dedicated by authority of law to a public use, unless such right is expressly conferred by the statute in direct terms or by necessary implication. *Matter of City of Utica*, 73 Hun, 256.

While a corporation cannot, under a power to take lands for a public use, take from another corporation having the like power lands held by the latter for a public use pursuant to its charter, yet an easement may be acquired, *in invitum*, in such lands when it may be enjoyed without detriment to the public or without interfering with the use to which the lands are devoted.

So, also, lands held by a corporation or public body, but not used for or necessary to a public purpose, may be taken if held by an individual owner. *Matter of Rochester Water Com'rs*, 66 N. Y. 413.

Property which has been acquired by a railroad company and that is used and necessary for the purpose of running and operating the railroad cannot be taken by the city for a street under condemnation proceedings, except by a special legislative authority, and neither the provisions of the Consolidation Act nor of the New York city charter, both being general statutes, confer the requisite authority for the purpose. *Matter of Mayor (East 161st St.)*, 52 Misc. 596, 102 Supp. 500.

In proceedings by the city of Buffalo, under section 417, etc., of its charter (L. 1891, chap. 105), to acquire title to the bed of the Buffalo river, the Legislature left the question of the propriety and necessity of acquiring such lands to the determination of the city, and it is not necessary in the proceeding to furnish proof of the necessity for acquiring such lands. *Matter of City of Buffalo*, 189 N. Y. 163, rev'g 116 App. Div. 555, 101 Supp. 966.

The last clause of section 90 of the Railroad Law (L. 1890, chap. 565), declaring that "nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation" is applicable only to the construction and interpretation of that section and was not intended to restrict the power of eminent domain, or authority to exercise that power within a city by condemnation proceedings given by other sections of that law to corporations subject to it. *Schenectady Railway Co. v. Lyon*, 41 Misc. 506; aff'd, 88 App. Div. 201, 84 Supp. 759.

The mere fact that land proposed to be taken by a railroad company is not needed for the present and immediate purposes of the petitioner is not necessarily a defense to a proceeding to condemn it. *Matter of S. I. Rapid Transit Co.*, 103 N. Y. 251.

A railroad corporation in taking land is not limited to its present use, but may acquire for its prospective use, provided the necessity for such use, in the immediate future, is established beyond reasonable doubt. *Matter of Mayor (East 161st St.)*, 52 Misc. 596, 102 Supp. 500.

A submission to the voters of a village of the question whether the taxes authorized by chapter 680, Laws of 1894, should be levied and collected was not authorized by the act, and was not equivalent to a submission of the question whether a lighting system should be established, and such submission was insufficient to authorize the institution of condemnation proceedings under the act. *Matter of Village of Le Roy*, 35 App. Div. 177, 55 Supp. 149, aff'g 23 Misc. 53, 50 Supp. 611.

Where no change in the grade of the highway was involved in the construction of a crossing, the statute conferred no authority to change the course of the highway or to condemn lands for that purpose. *People ex rel. Bacon v. Northern Cent. Ry. Co.*, 164 N. Y. 289, modif'g 35 App. Div. 624, 54 Supp. 1112.

Where the Legislature passed a law to widen a city street twenty feet on each side, reserving the added space for ornamental courtyards, such taking was for a public purpose, and a proper subject for the exercise of the power of eminent domain. *Matter of City of New York*, 57 App. Div. 166, 68 Supp. 196; aff'd, 167 N. Y. 624.

A city authorized by special statute (L. 1903, chap. 193) to condemn lands for a public use, the construction of trunk and intercepting sewers, may condemn lands, when held by a railroad company by purchase and occupied by it for tracks, to the extent of laying a sewer under the tracks, under the same rules as apply to the lands of an individual.

The mere fact that a railroad corporation owns and possesses lands creates no presumption that it acquired exclusive possession and use of them under the power of eminent domain, and holds them in trust for a public purpose.

Semble, that where lands have been condemned and are held for the public use the Legislature may authorize another to occupy them for another public use, where the latter use may be enjoyed without detriment to the public or interference with the prior use. The delegation of authority must, however, be granted in express terms by necessary implication. *Matter of the City of Gloversville*, 42 Misc. 559, 87 Supp. 612.

Where there was no public necessity for the construction of a proposed railroad the railroad company was not entitled to condemn land for a right-of-way, promoters being unauthorized to take property for a right-of-way for their own use. *People ex rel. Potter v. Bd. of Railroad Com'rs*, 124 App. Div. 47, 108 Supp. 288; judgment aff'd, 192 N. Y. 573.

In the exercise of the right of eminent domain a municipality may take land, not actually required for the traveled way, in order to find ample space for light and air, beauty and adornment, under legislative authority. *Matter of Curran*, 38 App. Div. 82, 55 Supp. 1018, aff'g 25 Misc. 432, 54 Supp. 917.

The clause of section 90 of the Railroad Law (L. 1890, chap. 565, as amended by L. 1895, chap. 933), which provides, "Nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation," was not designed to prevent a street surface railroad company from acquiring, in condemnation proceedings, the right to build its road upon a public street, the fee of which is vested in the abutting owners. *Schenectady Railway Co. v. Peck*, 88 App. Div. 201, 84 Supp. 759.

Subd. 3. Power May be Delegated for a Public Purpose.

In *Matter of New York Central R. R. Co.*, 66 N. Y. 407, it was said by Judge Rapallo, in the opinion, that "in the case of *Rensselaer & Saratoga Railroad Co. v. Davis*, 43 N. Y. 137, this court decided that, by the

General Railroad Law, the Legislature had not delegated to railroad corporations the power of determining what lands were necessary to be appropriated to their use for the purposes of the incorporation, but that, under that statute, it was for the court to determine upon the application by a railroad company to acquire lands, the question of the necessity and extent of the appropriation, and that the landowner might contest this question. This necessity is, therefore, made a judicial question, and, when controverted, it is obvious that the facts must, in some form, be laid before the court to enable it to decide."

The Legislature can delegate power to private corporations if carrying on business of a public nature, and may prescribe how the power may be exercised by them. Where provision is made upon the failure to obtain the consent of the property-owners to institute proceedings before special tribunal, the determination of that tribunal when made within its jurisdiction, and upon proper notice, is conclusive upon all parties and cannot be questioned collaterally. *Matter of Union Elevated R. R. Co.*, 112 N. Y. 61, 20 St. Rep. 498, aff'g 17 St. Rep. 630.

While the State may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume at will, subject to property rights and the duty of paying therefore. There is no limitation upon the exercise of the power except that the use must be public, compensation must be made, and due process of law observed. *People v. Adirondack Railway Co.*, 160 N. Y. 225, 237.

If the use of the land sought to be accomplished, through the exercise of the right of eminent domain, is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection that it will benefit one person or class of persons more than others, or that it originated through private interests, and that it intended to some extent to subserve private purposes; and thus the public use of a natural waterway, to float logs from one part of the State to the great lakes, is a public use within the meaning of the Constitution, and the validity of the act is not open to question on the ground that the use is not public. *Matter of Burns*, 155 N. Y. 26.

The necessity of laying out a new street in a city is a matter exclusively for the determination of the mayor and common council. The purpose is indisputable a public one; and, in taking lands by the right of eminent domain, it is the settled law of this State that if the use to which lands are to be put is public the Legislature, or the instrumentality which it employs, is the sole judge of the necessity. *People ex rel. Ithaca v. D., L. & W. R. R. Co.*, 11 App. Div. 280, 42 Supp. 1011; aff'd without opinion, 159 N. Y. 545.

The condemnation of lands along the river front of New York city for use of piers, wharves, etc., is not unlawful as being for a private use, and

the fact that the property to be taken is already in use by a railroad company does not prevent condemnation proceedings. *Matter of Mayor*, 135 N. Y. 253, 47 St. Rep. 816.

The sovereign power of eminent domain, subject to the restrictions imposed by the Constitution, may be exercised with respect to the public as well as the private rights of the citizen.

The Legislature has power and may delegate the power to municipal authorities to withdraw from public use what is, in legal contemplation, a public highway, and appropriate it to some other or *quasi*-private use, subject only to the restriction that the new appropriation shall be in the direction of public utility. *People v. B. & O. R. R. Co.*, 117 N. Y. 150.

The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation. *Wormser v. Brown*, 149 N. Y. 163, (171), citing *Hoey v. Gilroy*, 129 N. Y. 132; *People v. B. & O. R. R. Co.*, 117 N. Y. 150, (155); *Jorgensen v. Squires*, 144 N. Y. 280.

The Legislature has power to authorize a foreign railroad corporation lawfully operating its road within the State to acquire by condemnation additional lands required for railroad purposes.

Such a corporation, in the contemplation of the statutes of the State and to the extent of its existence and operation here, is *quo hac vice* a State corporation. *N. Y., N. H. & H. R. R. Co. v. Welsh*, 143 N. Y. 411.

The authority of a municipal corporation to take private property must be expressly conferred, and the power and manner of its exercise strictly pursued. "Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed and the prescribed mode for its exercise strictly followed is a just one, and should within all reasonable limits be inflexibly adhered to and applied."

No intent to deprive a person of his property rights should be imputed to the lawmaking power, unless it is expressly declared, or is to be necessarily implied from the language of the statute, and it is never necessarily implied if it admits of any other reasonable construction. *Schneider v. City of Rochester*, 160 N. Y. 165, 172, citing *Dillon on Municipal Corporations* and *Lewis on Eminent Domain*.

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally as to defeat the evident purposes of the Legislature.

The powers granted will extend no farther than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. *In re N. Y. C. R. R. Co. v. Kip*, 46 N. Y. 546.

The act authorizing the condemnation of private property for public purposes must, however, be clear and explicit. If there are doubts as to the extent of the power after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to its exercise. *New York R. R. Co. v. Kip*, 46 N. Y. 546. And before the fee can be taken in the exercise of power of eminent domain, it must appear that such was the intention of the Legislature, disclosed by the act. *Washington Cemetery v. Prospect Park*, 68 N. Y. 591. Nor, on the other hand, can the public be compelled to take a fee where an easement will suffice.

In construing statutes authorizing the exercise of the power of eminent domain a strict rather than liberal construction is the rule. This power is in derogation of the ordinary rights of private ownership and of the control which the owner usually has of his property, and it is proper to exact from the petitioner that he should fulfill and carry out all the conditions and restrictions imposed by legislative acts under which he proceeds. To sustain the exercise of eminent domain by a body which claims to be a corporation, and as such to exercise such right and to take the property of a citizen, it is not sufficient that it is a corporation *de facto*, it must be a corporation *de jure*. *Matter of N. Y. Cable Co.*, 104 N. Y. 1.

Proceedings for condemnation cannot be maintained unless the person instituting it has authority under some statute to acquire title to land for public use. *Matter of Thompson*, 86 Hun, 405, 33 Supp. 467, 67 St. Rep. 193; *aff'd*, 147 N. Y. 701.

Public use and necessity are essential elements of obtaining condemnation, and the question of necessity is for the court to determine, unless the intent of the Legislature to make the action of the officers of a city conclusive on that question shall clearly appear. *City of Rome v. Whitestone Water-Works Co.*, 113 App. Div. 547, 100 Supp. 357; *aff'd*, 187 N. Y. 542.

In condemnation proceedings by a private corporation an unqualified fee of real property cannot be taken without express authority. In all cases where private property is taken for public use, the extent and quality of the interest taken should be measured by public convenience and necessity. *Hudson & Manhattan R. R. Co. v. Wendel*, 193 N. Y. 166, *aff'g* 122 App. Div. 917.

Term "Railroad Corporation," as used in General Railroad Act (L. 1890, p. 1083, chap. 565, § 4), includes elevated railroads, and such roads

have power to acquire lands necessary for maintenance and accomodation. *Manhattan R. Co. v. Astor*, 56 Misc. 353, 107 Supp. 666.

Where there is no public necessity for the road, a railroad company cannot condemn. *People v. Railroad Com'rs*, 124 App. Div. 47, 108 Supp. 288; aff'd, 192 N. Y. 573.

Fact that land for side tracks could be obtained in other directions held not to show lack of necessity, weight being given to discretion of officers. *N. Y. C. & H. R. R. Co. v. Dailey*, 57 Misc. 311, 109 Supp. 501.

Under Railroad Laws (L. 1892, p. 1395), providing that no railroad shall commence construction until railroad commissioners certify public convenience and necessity, and that if such certificate is refused application may be made to the Supreme Court, *held*, that the applicant has the burden to show that the commissioners erred in their determination.

On such application great weight should be given to the decision of the commissioners. *In re Rochester, C. E. Trac. Co.*, 118 App. Div. 521, 102 Supp. 1112; *dism'd*, 189 N. Y. 522.

Evidence held sufficient to establish the existence of a reasonable necessity for the condemnation of land to increase the water supply of a city. *City of Rome v. Whitestown Water-Works Co.*, 113 App. Div. 547, 100 Supp. 357; aff'd, 187 N. Y. 542.

Subd. 4. Compensation Must be Made.

The Fifth Amendment to the Federal Constitution provides that private property shall not be taken for public use without just compensation. The State Constitution also so provides.

The fee to lands in the city is as sacred to the owner as it is in the country, and in either place he is protected by the constitutional provision, to the effect that property shall not be taken for public purposes without compensation. *Osborne v. Auburn Telephone Co.*, 189 N. Y. 393, 397, rev'g 111 App. Div. 702, 97 Supp. 874.

In the proceeding to condemn property for public uses there is nothing in the nature of a contract between the owner and the State, or the corporation which the State in virtue of her right of eminent domain authorizes to take the property; all that the Constitution of the State or of the United States or justice requiring in such cases being that a just compensation shall be made to the owner; his property can then be taken without his assent. *Garrison v. City of New York*, 21 Wall. 196.

While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. *Litchfield v. Bond*, 186 N. Y. 66 (74), rev'g 105 App. Div. 229, citing *Sweet v. Rechel*, 159 U. S. 380, 398; *Sage v. City of Brooklyn*, 89 N. Y. 189 (195);

Matter of Mayor, etc., of N. Y., 99 N. Y. 569 (577); *Brewster v. Rogers Co.*, 169 N. Y. 73 (80).

In order to make a lawful taking by the State under eminent domain, the provision for making compensation must pre-exist the taking. *Remington v. State*, 116 App. Div. 522, 101 Supp. 952.

A statute authorizing the condemnation of lands must provide either that adequate compensation for the lands to be appropriated be made before possession or title is acquired, or that payment therefor must be secured beyond a doubt to the owner. *State Water Supply Co. v. Curtis*, 125 App. Div. 117, 109 Supp. 494; aff'd, 192 N. Y. 319.

A provision of statute law authorizing the taking of private property by the State or one of its municipal cities under the right of eminent domain, without providing for payment prior to or concurrently with the taking, is constitutional if a sure, sufficient, and convenient remedy is provided by which the owner can subsequently compel payment by legal proceedings. *Connolly v. Van Wyck*, 35 Misc. 746, 72 Supp. 382.

A city is absolutely without power to take private docks and wharves for a highway without compensating the owners. *City of Buffalo v. D., L. & W. R. R. Co.*, 68 App. Div. 488, 74 Supp. 343; aff'd without opinion, 178 N. Y. 561.

The placing, pursuant to a resolution of the common council of a city, beneath the surface of a street, the fee of which is in the abutting owners, of a conduit for telephone wires owned by a private corporation, which have previously been maintained on poles erected in the street, does not constitute an additional burden upon the street which will entitle the abutting owners to additional compensation. *Castle v. Bell Telephone Co.*, 49 App. Div. 437, 63 Supp. 482.

Serious and substantial injury to residence property resulting from use of soft coal in operating municipal pumping station is an appropriation of property to extent of injury. *Gordon v. Silver Creek*, 127 App. Div. 888, 112 Supp. 54; aff'd, 197 N. Y. 509.

By the Transportation Corporations Law, section 102, leave is granted by the State to telegraph and telephone companies to construct and maintain their fixtures "over or under any of the public roads, streets, and highways." This is full permission without compensation so far as the State can give it. Where, however, the fee of the highway belongs to the abutting owners, instead of being in the State or any of its political subdivisions or bodies politic, compensation to such owners has to be made for the easement taken by such companies (*Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133). *State Line Telephone Co. v. Ellison*, 121 App. Div. 499, 500.

The payment of interest is not a matter of right; and an act providing for taking property for public use is not unconstitutional because, in its

provisions for making compensation to the owner, it does not provide for the payment of interest to him from the time of the passage of the act to the time when the award shall be paid. *Matter of City of New York*, 68 Misc. 509, 125 Supp. 209.

The appropriation by an electric street railway company of a street, the fee of which is in the abutting owners, constitutes a taking of private property. *Peck v. Schenectady Railway Co.*, 67 App. Div. 359, 73 Supp. 794; aff'd, 170 N. Y. 298.

The closing of a street from which plaintiff had convenient access to his lot, held to afford him ground for a claim for damages, though he was left a means of access by way of an intersecting street. *Egerer v. N. Y. C. R. R. Co.*, 39 App. Div. 652, 57 Supp. 133.

A legislative grant to a telephone company, authorizing it to erect its lines along the public highway, does not authorize the company so to do without compensation to the abutting owners, the Legislature having no power to give title to the premises, or to impose an additional burden thereon. *Andrews v. Delhi & Stamford Tel. Co.*, 36 Misc. 23, 72 Supp. 50; aff'd, 66 App. Div. 616.

The right of a millowner to use the waters of a stream as a propelling power at his mill is an incorporeal hereditament connected with the land, and may be acquired, under the provisions of the said act, upon due compensation being made therefor. *Stamford Water Co. v. Stanley*, 39 Hun, 424.

An easement of access, acquired by grant, is a property right which is subject to condemnation. *Ray v. New York Bay Extension R. Co.*, 34 App. Div. 3, 53 Supp. 1052; dism'd, 158 N. Y. 702.

Although individuals owning the fee of a public street have given up a public right of way thereover, the Legislature cannot authorize the construction of a subway under said street involving large consequential damage to abutting owners without payment of just compensation, for such use was not contemplated at the time of the original grant or condemnation of the public way. *Matter of Bd. of Rapid Transit R. R. Com'rs*, 128 App. Div. 103, 112 Supp. 619; modif'd 197 N. Y. 81.

There is no property in a naked railroad route, existing on paper only, which the State is obliged to pay for when it needs the land covered by that route for a great public improvement, and its officers are authorized to act by appropriate legislation. *People v. Adirondack Railway Co.*, 160 N. Y. 225, rev'g 39 App. Div. 34, 56 Supp. 869; rev'd, 176 U. S. 335.

The appointment of commissioners to award compensation under the Grade Crossing Act cannot be refused on the ground that the injury to property not actually taken was apparently small and the damages of little consequence. *Matter of Grade Crossing Com'rs*, 154 N. Y. 561, 49 N. E. Rep. 131.

If the owner obtains the value of his property at the time his title and possession are taken away from him he obtains all the compensation granted by the Constitution. *Matter of Trustees, etc.*, 137 N. Y. 95, 50 St. Rep. 182, modif'g 47 St. Rep. 932, 21 Supp. 233.

Chapter 490, Laws of 1883, is not unconstitutional because it provides for taking private property for public use without making immediate compensation, as the provision for the issue of city bonds to pay such damages amply compensates the property-owner. *Matter of Gilroy*, 32 App. Div. 216, 52 Supp. 990, 86 St. Rep. 990.

The provisions of section 822 of the charter of the city of New York (L. 1901, chap. 466) relating to the acquisition of lands for the improvement of the water front and authorizing the setting off of benefits against an award for land to be taken therefor must be regarded solely as an exercise of the power of eminent domain and are unconstitutional (Const., art. 1, § 6); since the full value of the land taken, in money alone, without any deduction for benefits which may result from such use, is the measure of that just compensation guaranteed the owner by the Constitution and especially where, as in this case, the city acquires the fee and is under no obligation to continue the public use for which the land was taken. *Matter of City of New York*, 190 N. Y. 350, modif'g 120 App. Div. 849.

Compensation is not to be made to one whose lands are not taken, although he suffers consequential damages by reason of the construction of the road. *Barnes v. Southside R. R. Co.*, 2 Abb. N. S. 415; *Arnold v. H. R. R. Co.*, 49 Barb. 108.

It is competent for the Legislature to authorize municipal corporations to take private property for public use without first making payment, provided adequate provision is made by which the owner can coerce compensation without reasonable delay. *Kelley v. Mayor*, 89 Hun, 246, aff'g 6 Misc. 516, 56 St. Rep. 835, 27 Supp. 164.

The provisions of chapter 670, Laws of 1869, that "if any building shall be erected on the line of any avenue or street as laid out on said plan after the filing of said map, no compensation shall be paid to the owner thereof on the opening of said street," are unconstitutional. *German-American Real Estate Title Guarantee Co. v. Myers*, 32 App. Div. 41, 52 Supp. 449, 86 St. Rep. 449.

In proceedings by a municipal corporation under title 1, chapter 23, of the Code, to acquire title to lands for a public park, the municipality cannot be vested with title except upon payment of the sum appraised as the value of lands taken, and the owner cannot, therefore, be harmed by the possible inadequacy of the appropriation. *Village of Babylon v. Bergen*. 69 Misc. 574.

Where the city of New York appropriates the tideway on the Harlem river, the owner of uplands abutting thereon is entitled to compensation

for the destruction of his riparian rights, where such taking was not connected with navigation or commerce. *Matter of City of New York*, 168 N. Y. 134, rev'g 60 App. Div. 122.

A telephone company holding a village franchise is not authorized to occupy a street, the title to which is in the abutting owner, against his wishes, without having acquired the right by condemnation proceedings. *Hudson River Telephone Co. v. Forrestal*, 56 Misc. 133, 106 Supp. 404.

Subd. 5. What Property Can be Appropriated.

A corporation having the right of eminent domain cannot exercise the power where it conflicts with the exercise of like right by the State itself for its own immediate purposes; nor does the rule that land once taken for a public use cannot be taken under eminent domain for another public purpose apply where the second taker is the State itself. *Adirondack R. Co. v. Indian River Co.*, 27 App. Div. 326, 50 Supp. 245.

The general principle is that all property is subject to the right of eminent domain, irrespective of the use to which it has been already applied or the different estates or interests held in it. *Pierce on Railroads*, 151, and cases cited. The language of the act, however, does not authorize a railroad corporation to subvert an appropriation of property to other public uses which are inconsistent with the use thereof for a railroad. *In Matter of City of Buffalo*, 68 N. Y. 171. It is held in *Matter of Rochester Water Com'rs*, 66 N. Y. 413, that neither a private nor municipal corporation can, under a general power to take lands for a public use, take from another corporation having the like power, lands or property held by it for a public purpose pursuant to its charter. The same principle is asserted in *Matter of N. Y. & B. R. R. Co.*, 20 Hun, 201; *In re Boston & Albany R. R. Co.*, 53 N. Y. 574; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *N. Y. City, etc., R. R. Co. v. Central Union Telegraph Co.*, 21 Hun, 261; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552.

Where lands have once been acquired or taken for public use they cannot be taken for another public use at least if such other use would interfere with or destroy that first acquired, unless the intention of the Legislature that such lands should be so taken is shown by express terms or by necessary implication. *N. Y. C. & H. R. R. Co. v. City of Buffalo*, 200 N. Y. 113.

The mere acquiring and appropriation by one railroad company of certain land to its own use, or even to a specific use, will not prevent another company from taking the same lands for the purpose of crossing or connecting with such other road; but, on the other hand, the road seeking to effect the crossing or connection may not invade or take such lands if the

use to which they have already been appropriated will thereby be rendered ineffectual. *Jennings v. D., L. & W. R. R. Co.*, 103 App. Div. 164, 93 Supp. 374; aff'd, 199 N. Y. 544.

The property of a corporation is equally liable with the property of a private citizen, to be taken for public uses on the payment of just compensation (*Prospect Park & Coney Island Co. v. Williamson*, 91 N. Y. 522); but it is there laid down that lands once taken for public use pursuant to law under the right of eminent domain cannot, under general laws, and without special authority from the Legislature, be appropriated by condemnation proceedings to a different public use.

Lands which have been once taken for and devoted to the public use, pursuant to law, cannot be again taken under the right of eminent domain and devoted to another public use without special authority of the Legislature. *Matter of the City of Buffalo*, 72 Hun, 422.

This rule only applies where it is sought to deprive the person or corporation to which the first public use is granted of a substantial use of the property. An easement may be acquired by condemnation in such property, when it may be enjoyed without detriment to the public and without interfering with the use to which the lands are devoted. *Matter of Foltz St.*, 18 App. Div. 568, citing *Matter of Rochester Water Co.*, 66 N. Y. 413. See *People ex rel. Yonkers v. N. Y. C. & H. R. R. Co.*, 69 Hun, 166.

It seems that city streets may be used for any public use consistent with their preservation as such, although the use may be new and impose an additional burden, and subject lot owners to injury, and that the use of the said streets for the ordinary horse or steam railroad, unless it practically closes the street, is lawful, and abutting owners whose lots are bounded by the sides of the street have no legal redress in the absence of negligence in the construction and operation of the railroad, although it may seriously interfere with the value of their property. *Kane v. N. Y. Elev. R. R. Co.*, 125 N. Y. 164. Land acquired by a railroad by purchase and used for terminal facilities may be taken by the State for a street without special legislation. *Matter of Alexander Av.*, 44 St. Rep. 546, 17 Supp. 933. But where the Legislature has conferred upon a corporation or municipality the general power to acquire lands by the right of eminent domain, such power does not apply to lands already dedicated by authority of law to the public use, unless such right is expressly conferred by the statute in direct terms or by necessary implication. *Matter of the City of Utica*, 73 Hun, 256, 58 St. Rep. 80, 26 Supp. 564.

The condemnation of lands along the river front of New York city for use of piers, wharves, etc., is not unlawful as being for a private use, and the fact that the property to be taken is already in use by a railroad company does not prevent condemnation proceedings. *Matter of Mayor*, 135 N. Y. 253, 47 St. Rep. 816, aff'g 18 Supp. 536, 45 St. Rep. 937.

State lands under the waters of the Hudson river, held by it as trustee for the public, may, under section 17 of the Railroad Law, be acquired for railroad purposes since such purposes are deemed to be a public use; and since, under section 18 of chapter 481 of the Laws of 1910, such lands are subject to grants for such purposes by the Commissioners of the Land Office. *N. Y. C. & H. R. R. Co. v. Matthews*, 70 Misc. 567.

ARTICLE II.

STATUTORY PROVISIONS AUTHORIZING EXERCISE OF POWER AND HOW CONSTRUED.

The right to exercise the power of eminent domain is expressly provided for by numerous statutes giving the right to take proceedings for condemnation of lands for various public purposes. The General Laws enumerate and provide for such condemnation for thirty-five specific purposes in addition to the provisions made by city and village charters and the right which exists to take lands for State purposes not specifically pointed out. The general statutory provisions can be readily found by reference to the index to the Consolidated Laws, vol. VII, p. 81, title "Condemnation of Land," and hence it is unnecessary to enumerate them here. The authorities construing and applying the statutes follow:

The proceedings to acquire title to lands for railroad purposes were held to be special proceedings (*New York Central R. R. Co. v. Marvin*, 11 N. Y. 276; *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592; *Matter of N. Y., W. S. & B. R. R. Co.*, 33 Hun, 231; *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *A & S. R. R. Co. v. Dayton*, 10 Abb. N. S. 182; *Matter of Cortland, etc., Horse R. R. Co.*, 98 N. Y. 336; *Matter of New York & Harlem R. R. Co.*, 98 N. Y. 12), and were regulated by the provisions of chapter 140, Laws of 1850, known as the General Railroad Act, and the amendments thereto, previous to the enactment of the Condemnation Law. The basis of the proceedings is the right of eminent domain, which existed prior to the Constitution (*Heyward v. Mayor of New York*, 7 N. Y. 314), but which is recognized by it. *Wallace v. Karlenowefski*, 19 Barb. 118. The limitations upon the right of eminent domain are that the use must be a public one, and that compensation must be made to the owner. *Beekman v. S. & S. R. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 Paige, 137; *Embury v. Conner*, 3 N. Y. 511; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100; *People v. Smith*, 21 N. Y. 595. Railroads are regarded as a public use of property, although occupied and used by private corporations. *Matter of Townsend*, 39 N. Y. 171; *N. Y. & H. R. Co. v. Kip*, 46 N. Y. 546.

The General Railroad Act gave to corporations created under it authority to acquire lands by the exercise of the right of eminent domain, both from individuals and from the State, for its prospective as well as present uses, provided the necessity for such use in the immediate future is estab-

lished beyond reasonable doubt. It seems, that as the exercise of this power is in derogation of individual right, it should be allowed only when the necessity clearly appears and the proposed use is clearly embraced within the legitimate objects of the power. *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251. A railroad company, under the power delegated to it by the General Railroad Act to acquire lands for the purposes of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated subject to the qualification that the purposes for which the land is taken are strictly within its charter, and the lands of private corporations are subject to the exercise of the right of eminent domain the same as individuals. *Matter of Petition of N. Y. C. & H. R. R. Co. v. The Metropolitan Gas-Light Co.*, 63 N. Y. 326.

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common-law rights, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally as to defeat the evident purposes of the Legislature. The powers granted will extend no further than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remain a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. Passenger depots, convenient and proper places for the storing and keeping of cars and locomotives; proper, secure and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and despatch, or after its arrival and discharge, and before delivery, are the acknowledged necessities for the running and operating of a railroad, and the right to take lands for those purposes is included in the grant of power given by the General Railroad Act, which authorizes a railroad corporation to acquire real estate "for the purposes of its incorporation or for the purpose of running or operating" its road. It is no objection to proceedings under the act that there are other lands in the same vicinity equally well adapted for the purposes which possibly might be acquired by purchase. The location of the buildings and structures of the company is within the discretion of its managers, and courts will not supervise it ordinarily. An usufructuary right, either temporary as to its continuance or limited as to its character, does not give to the company the property which it has a right under the statute to acquire. And whenever the proper running and operating of its road and the interests of the public require permanent structures, it is no objection to a proceeding to acquire the land in fee that the company is a lessee of the premises for a term of years. *Matter of the New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546. The only limit to the power granted to railroad corpora-

tions to take lands for railroad purposes is the reasonable necessity of the corporation in the discharge of its duty to the public. This includes the acquisition of lands for depots and buildings convenient and proper for the storage and keeping of cars and locomotives when not in use, and for the receipt, storage, safe-keeping, and delivery of freight and property, as well as such facilities as are usually required in operating its road and the successful prosecution of its business. When the necessity exists and a reasonable discretion is exercised, the courts will not interfere. In determining the necessity, the prospective needs of the corporation within a reasonable time may be taken into consideration. When a case is brought within the legitimate exercise of this power, the consideration that such exercise will be attended with extreme inconvenience and hardship to individuals is not entitled to any weight; where a clear right to the exercise of the power is shown, it is the duty of the courts to authorize it. The rule, however, that corporations deriving power from the Legislature to take property under the right of eminent domain cannot exercise such power in reference to property already dedicated to public use does not prohibit the acquisition of a right to use streets and avenues and piers at the end thereof, included within land sought to be condemned for railroad purposes. The rights in the waters of the port of New York reserved to the public by the acts of the Legislature, granting lands under water to the city of New York, are not invaded by the appropriation of the land for such railroad purposes. *Matter of New York Central & Hudson River R. R.*, 77 N. Y. 248. Railroad companies are not to be allowed to appropriate lands under the statute not wanted for present use, but only desired in view of prospective and conjectural increase in business; nor lands for building tenements for their servants, or wharves unless they are shown to be necessary for corporate purposes. Clear authority of law must be shown for taking private property. The court is to determine the necessity and extent of appropriation of land by a railroad company under the General Railroad Act. *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137. Where the company has immediate need of property for a passenger depot, the opinion of the officers as to its size and location are entitled to great weight unless it appear that, under pretense of the necessities of the company, it is seeking to injure others. *N. Y., West Shore & B. R. R. Co. v. Townsend*, 17 Week. Dig. 469. Where lands have been lawfully appropriated by a railroad company for depot purposes under the right of eminent domain, express legislation is necessary to justify their appropriation by proceedings *in invitum* to a different public purpose. Where lands were condemned for depot purposes, it was held that the erection thereon of decorations and conveniences for passengers, such as restaurants and music stands, was not such an abandonment of the uses for which the lands were acquired as to produce a forfeiture. *Prospect*

Park & C. I. R. R. Co. v. Williamson, 91 N. Y. 552, rev'g 24 Hun, 216; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574. The title to lands under water may be acquired by a railroad company without notice to the owner of the adjoining upland. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269, citing *Gould v. H. R. R. Co.*, 6 N. Y. 522.

It is said that a railroad corporation may acquire title to lands under water where parties having a grant have failed to fulfil conditions imposed. *Matter of N. Y., West Shore & Buffalo R. R. Co.*, 27 Hun, 57; rev'd, 89 N. Y. 453, on authority of 77 N. Y. 248, which is there approved. Where land is required for the legitimate purposes of a railroad in respect to its public use, it is subject to condemnation for such purposes under the General Railroad Act, although the route of the proposed road may not pass directly over it. *New York, Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148; aff'd without opinion, 98 N. Y. 664. But under the previous statute a company cannot acquire title to real estate without the owner's consent, simply for the purpose of removing gravel therefrom, to be used in constructing a distant part of the road. *Matter of N. Y. & Canada R. R. Co. v. Gunnison*, 1 Hun, 496. A railroad company is not disqualified to take proceedings to condemn land for its benefit by the fact that it has been leased to another company, nor is the rule altered by the fact that the lessee is a foreign corporation. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, aff'g 35 Hun, 220.

Before a proposed railroad can be built, its builders must obtain the right of way; they cannot take private property for that purpose without first making compensation therefor; and if they do, they become trespassers. *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98. The legal existence of a corporation authorized to construct a railroad is the foundation of the right to take property for its use under the right of eminent domain. *Matter of Kings Co. Elevated R. R.*, 1 St. Rep. 512. The provision of the General Railroad Act to divest owners of title to property without their consent must be strictly construed. *Adams v. Saratoga & Washington R. R. Co.*, 10 N. Y. 328, citing *Sharp v. Spier*, 4 Hill, 76; *Stryker v. Kelly*, 2 Denio, 323.

A railroad company cannot condemn lands to open a highway to a hotel a third of a mile distant for entertaining its patrons; and the construction of a place for the storage of boats of passengers visiting a watering place on the line of petitioner's railroad is not for railroad purposes, and the land, therefore, is not subject to condemnation. *Matter of Rochester & Glen Haven Rd. Co.*, 12 Supp. 566. Nor can land be taken for station purposes by a railroad company where no necessity therefor appears by the petition. *Matter of Union Elev. Rd. Co. v. Jewett*, 30 St. Rep. 162, 8 Supp. 813.

Although it was held that the fact that a railroad company owned property at a station, which it had leased to a company for purposes which largely increased railroad travel, it is no objection to an application to condemn other lands for that purpose. *In re N. Y. C. & H. R. R. Co.*, 28 St. Rep. 64, 8 Supp. 290, 5 Silvernail, 353.

The power of eminent domain, which resides in the State as an attribute of sovereignty, is dormant until called into exercise by an act of the Legislature.

Whenever an attempt is made by the State or by a corporation to take private property under this power, those claiming the right must be able to point to a statute conferring it. Such statutes are to be construed strictly rather than liberally. *Matter of Thomson*, 86 Hun, 405, 33 Supp. 467; aff'd, 147 N. Y. 701.

A railroad may acquire land outside of its proper route for the purpose of making connections with an intersecting road. *Matter of Brooklyn Elevated Rd. Co.*, 32 St. Rep. 1065, 11 Supp. 161. So, also, a railroad company may institute proceedings to condemn land after a road has been constructed. *Matter of Metropolitan Rd. Co.*, 12 Supp. 502. A foreign railroad corporation may acquire lands by the exercise of the power of eminent domain. *Matter of Appraisal of Lands of Marks*, 25 St. Rep. 502, 6 Supp. 105; *N. Y., N. H. & Hartford R. R. Co. v. Welsh*, 52 St. Rep. 532, 23 Supp. 195. Proof that additional tracks are needed to enable a company to unload passengers so as to avoid delays is sufficient to show necessity for lands sought to be condemned. *N. Y., N. H. & Hartford R. R. Co. v. Welsh*, 52 St. Rep. 532, 23 Supp. 195. Street railroad companies have power to acquire property belonging to private individuals by condemnation. *Matter of Application of Roch. Elec. Ry. Co.*, 57 Hun, 56; aff'd, 123 N. Y. 351. An electric railway company may maintain such proceedings to condemn an easement, although the road has been constructed. *Matter of Met. Elevated Ry. Co. v. Dominick*, 55 Hun, 198, 27 St. Rep. 576, 8 Supp. 15. But a private corporation not organized, carrying on a railroad for the public use, cannot maintain condemnation proceedings. *Matter of Split Rock Cable Rd. Co.*, 128 N. Y. 408, 28 N. E. Rep. 506, 40 St. Rep. 335. aff'g 58 Hun. 351, 53 St. Rep. 169, 12 Supp. 116.

The Legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this State, to acquire by condemnation additional lands required for railroad purposes. Such a corporation is, in the contemplation of the statutes of the State, and to the extent of its existence here, for those purposes, a State corporation. The term "every railroad corporation," in the General Railroad Law, includes foreign railroad corporations, which, under authority of law, have extended and are operating their roads in this State, and under the former

act such a corporation had authority to acquire by condemnation additional real estate, when needed for the proper operation of its road, and to meet the public demands of travel and traffic. *N. Y., N. H. & Hartford Railroad v. Welsh*, 143 N. Y. 411, 62 St. Rep. 429.

A railroad may acquire land outside of its proper route for the purpose of making connections with an intersecting road. *Matter of Brooklyn Elevated R. R. Co.*, 32 St. Rep. 1065, 11 Supp. 161. And may institute proceedings to condemn land after the road has been constructed. *Matter of Metropolitan R. R. Co.*, 12 Supp. 502.

By chapter 252, Laws of 1884, the same power was conferred upon street railroads as upon general railroad corporations to take private property condemnation. *Matter of Rochester Electric R. R. Co.*, 57 Hun, 56, 32 St. Rep. 1, 10 Supp. 379. An elevated railway company may maintain proceedings to condemn an easement in property of an abutting owner, notwithstanding the road has been constructed, and that the past use of easements, without compensation, may be deemed a continuing trespass. *Matter of Metropolitan Elevated R. R. Co. v. Dominick*, 55 Hun, 198, 27 St. Rep. 576, 8 Supp. 151.

A railroad corporation, under the power delegated to it by the General Railroad Act, to acquire title to lands for the purpose of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated, subject to the qualification that the purposes for which the land is to be taken are strictly within its charter. Where a reasonable necessity is shown, the courts will not interfere with the exercise of its discretion in selecting suitable lands, unless the selection will result in great injury, or was influenced by some improper motive. *In re N. Y. C. & H. R. R. Co. v. M. G. L. Co.*, 63 N. Y. 326.

A railroad corporation in taking land is not limited to its present use, but may acquire for its prospective use, provided the necessity for such use, in the immediate future, is established beyond reasonable doubt. *Matter of Mayor (East 161st St.)*, 52 Misc. 596, 102 Supp. 500.

The power of eminent domain is exercised by municipal corporations in taking property for public parks and highways, by railroad companies for passenger stations and approaches thereto, engine-houses, warehouses, and cattle-yards, shops, and for other purposes incidental and necessary to the business of the company. *In re N. Y. C. & H. R. R. Co.*, 77 N. Y. 248; *In re N. Y. C. & H. R. R. Co. v. Metropolitan Gas-Light Co.*, 63 N. Y. 326.

For canal purposes. *Rogers v. Bradshaw*, 20 Johns. 735; *Steele v. Inland Navigation Co.*, 2 Johns. 283; *Jackson v. Daley*, 5 Wend. 526. Eminent domain may be exercised for water-works for the supply of villages and cities. *Mayor of New York v. Bailey*, 2 Denio, 43; *Gardner v. Newburgh*, 2 Johns. Ch. 162. For the laying of gas-pipes. *In re Bloom-*

field & R. Nat. Gas-Light Co. v. Richardson, 63 Barb. 437; *In re Deering*, 93 N. Y. 361.

The right of eminent domain extends not only to public highways, but to private roads; and where land is condemned under the right of eminent domain, it includes any right or easement connected with it, belonging to the land. *Williams v. N. Y. C. R. R.*, 16 N. Y. 97; *Arnold v. H. R. R. Co.*, 55 N. Y. 661. And the right of eminent domain may be exercised over the reversion. *Heard v. Brooklyn*, 60 N. Y. 242. The right to use water and power. *Bank of Auburn v. Roberts*, 44 N. Y. 192. An easement over the lands of another. *People v. Haines*, 49 N. Y. 587. The right to use running water. *Gardner v. Newburgh*, 2 Johns. Ch. 161.

In the exercise of the right of eminent domain a municipality may take land, not actually required for the traveled way, in order to afford ample space for light and air, beauty and adornment, under legislative authority. *Matter of Curran*, 38 App. Div. 82, 55 Supp. 1018, aff'g 25 Misc. 432, 54 Supp. 917.

A city for the purpose of constructing and maintaining a public sewer may condemn lands of a railroad company to the extent of laying the sewer under its tracks. *Matter of City of Gloversville*, 42 Misc. 559, 87 Supp. 612.

Furnishing light to a municipality is a public service, and an electric light company in any town or village in this State having contracts with towns or incorporated villages for the lighting of streets though a private corporation may acquire by condemnation lands to enable it to increase its powers in order to furnish more electricity under such contracts. *Matter of E. Canada Creek El. L. & P. Co.*, 49 Misc. 565, 99 Supp. 109.

The Supreme Court has jurisdiction to appraise the value of easements taken as necessary to drain lands. *Matter of Hodge*, 28 Misc. 104, 59 Supp. 775.

ARTICLE III.

DEFINITIONS, AND SCOPE OF ACT. § 7, Art. 1. (in part) Const.; Code, §§ 3357, 3358, 3359, 3383.

§ 3357. *Title.* 494

§ 3358. *Definitions.* 494

§ 3359. *Proceedings to be taken as prescribed in this title.* 495

§ 3383. *Repealing clause.* 495

§ 7. Art. 1., Constitution.

"When private property shall be taken for public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

§ 3357. *Title.*

This title shall be known as the Condemnation Law.

§ 3358. *Definitions.*

The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the State and a political division thereof, and any com-

mission, board, board of managers, or trustees in charge or having control of any of the charitable or other institutions of the State; the term "real property," any right, interest, or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought the defendant.

§ 3359. Proceedings to be taken as prescribed in this title.

Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

§ 3383. Repealing clause.

So much of all acts or parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for public use is repealed, except such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New York, known as the mayor, aldermen, and the commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

The General Condemnation Law of the Code of Civil Procedure (chap. 23, tit. 1) is a statute which merely regulates the procedure for the condemnation of property, and authorizes such procedure only when the person instituting it has authority under some independent statute to acquire the title to real property for public use. *Matter of Thomson*, 86 Hun, 405; aff'd, 147 N. Y. 701.

A complete system of practice in condemnation proceedings is provided by chapter 23 of the Code, which is a revision of the Condemnation Law, and an order dismissing the proceedings is treated as a final judgment dismissing the complaint. *Village of Canandaigua v. Benedict*, 13 App. Div. 600, citing *Matter of Trustees*, 137 N. Y. 97. But the clear intention of the Condemnation Law (chap. 23 of the Code), is to adopt the procedure under that law as far as practicable to the ordinary procedure in actions and proceedings. The only material change is that the appellant must now go in the first instance to the Special Term, and no longer has an option to proceed either at the Special Term or at the General Term. *Matter of Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571; aff'd, 150 N. Y. 569.

The Condemnation Law was not made part of the Code until 1890, and as it was thereby intended to prescribe a method of procedure in a particular class of cases, its provisions are to be regarded as exceptions to the general and earlier provisions of the Code when they are necessarily inconsistent. The whole proceeding forms an independent and

complete system of procedure created by the Legislature for the condemnation of real property. *Erie R. R. Co. v. Steward*, 59 App. Div. 187, 69 Supp. 57.

It is said in *Matter of One Hundred Sixty-Third St.*, 61 Hun, 365, that it is clear that this is a special proceeding under section 3334, and it is so considered by all the authorities upon the theory that it is not an ordinary prosecution in a court of justice, and hence not an action. That is to say, not commenced by a summons. Dismissed, 131 N. Y. 569.

The proceeding under the Condemnation Law is a special proceeding. *Matter of City of Rochester*, 102 App. Div. 99 (101), 92 Supp. 478.

A proceeding taken by the city of New York under the Consolidation Act to acquire lands is, within the definition contained in section 3334 of the Code, a special proceeding, and should be heard as such proceedings are ordinarily heard, although no particular method of procedure is prescribed by that act. *Matter of Mayor*, 22 App. Div. 124, 47 Supp. 965, 81 St. Rep. 965.

The term "real property" as used in the Condemnation Law includes any right, interest, or easement therein, or appurtenances thereto, and lands under water adjacent to the upland are appurtenant to the upland. *N. Y. C. & H. R. R. Co. v. Mathews*, 144 App. Div. 732.

The word "owner," as used in the Condemnation Law, includes all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon, and as the Public Lands Law provides that no grant of lands under water shall be made to any person other than the proprietor of adjacent lands, such proprietor is a necessary party to a proceeding to condemn lands under water. *N. Y. C. & H. R. R. Co. v. Mathews*, 144 App. Div. 732.

In *Dansville v. Hammond*, 77 Hun, 39, 28 Supp. 454, it is said that a complete system of practice is provided by chapter 23 of the Code, and in *Matter of Trustees*, 137 N. Y. 95, that chapter is assumed to be a revision of the Condemnation Law.

The purpose of the Legislature in enacting the Condemnation Law to supplement all laws with reference to the taking of private property for public purposes is clearly evidenced by its language. The language related not to any particular act, but to all acts. Whenever the Legislature authorized any person or corporation to take private property for public purposes, this act was to come into operation and provide a method of procedure. It does not authorize the taking of the property of any one, but merely prescribes the methods of judicial procedure and due process of law in those cases where by virtue of the provision of some other law, the exercise of the right of eminent domain has been conferred for public purposes, and the purpose of the enactment was to establish one rule throughout the State by which the rights of persons in their property

should be determined. *County of Orange v. Ellsworth*, 98 App. Div. 275, citing *Rochester Railway Co. v. Robinson*, 133 N. Y. 242, 247.

The proceeding to ascertain the compensation to be made to the owner of property taken for public use is in the nature of an inquest on the part of the State and is under her control; and to secure a just estimate of the compensation to be made she can vacate or authorize the vacation of any inquest taken by her direction where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. Until the property is actually taken and the compensation is made or provided, the power of the state over the matter is not ended. *Garrison v. City of New York*, 21 Wall. 196.

The liability to pay for private property taken for a public use is a liability created by the Constitution, and is not created by a statute which empowers a municipality to take land and provides the procedure by which compensation is to be obtained; hence, a proceeding by a landowner to obtain compensation through the procedure provided by such statute is not a proceeding "to recover upon a liability created by statute," and is not within the six years' limitation imposed by subdivision 2 of section 382 of the Code of Civil Procedure. *In re Clark v. Water Commissioners*, 148 N. Y. 1, rev'g 74 Hun, 294.

Proceedings to condemn lands for railroad purposes were held to be special proceedings in *N. Y. C. & H. R. R. Co. v. Marvin*, 11 N. Y. 276, and *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137.

The proceeding for condemnation is a special proceeding and not an action. Special provision is made by this statute for the trial of issues raised by the petition and answers, for a decision, judgment, and final order, and for appeals therefrom. *Erie Railroad Co. v. Stewart*, 59 App. Div. 187, 69 Supp. 57.

It has, however, an analogy to "actions," in that it provides that the parties shall be known as plaintiff and defendant and for raising an issue as to the facts stated in the petition by "answer," also for the "trial" of the issues raised thereby, followed as above stated by a "judgment" adjudging that the condemnation of the property is necessary for the public use.

ARTICLE IV.

THE PETITION AND PROCEEDINGS THEREON. §§ 3360, 3361, 3362, 3366, 3381.

§ 3360. *Petition; what to contain*, 498.

Subd. 1. Parties to the proceeding, 498.

Subd. 2. Statutory requirements must be complied with, 500.

Subd. 3. The description of lands, 506.

Subd. 4. Verification of pleadings, 510.

§ 3366. *Verification of petition or answer*, 510.

Subd. 5. Amendment to petition, 510.

Subd. 6. Notice and service of petition and notice of pendency, 511.§ 3361. *Notice to be annexed to petition; service of, 511.*§ 3362. *Service of petition and notice, 511.*§ 3381. *Notice of pendency of action to be filed, 512.*§ 3360. **Petition; what to contain.**

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the Supreme Court, setting forth following facts:

1. His name, place or residence, and the business in which engaged; if a corporation or a joint-stock association, whether foreign or domestic, its principal place of business within the State, the names and places of residence of its principal officers, and of its directors, trustees, or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the State, the names and places of residence of its principal officers; and if the State, or any commission or board of managers, or trustees in charge or having control of any of the charitable or other institutions of the State, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specified description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the State authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated, with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Subd. 1. Parties to the Proceeding.

Proceedings for the condemnation of land, streams, water, or water rights for a village water supply, under section 223 of the General Village Law, must be brought in the name of the village and not in the name of the board of water commissioners. *Matter of Roe*, 59 Misc. 535, 111 Supp. 755.

A petition for the appointment of commissioners to appraise the compensation to be paid for lands to be taken for a town hall may be made by the town board. *Town Bd. of Jamaica v. Denton*, 70 Supp. 837.

Under the law which confers upon board of supervisors the right to

acquire property, a county by its board of supervisors may proceed under section 92 of chapter 481 of the Laws of 1910 (Railroad Law) for the appointment of commissioners to condemn lands necessary to a change in grade crossing; and the words "municipal corporation in which the highway crossing is located" are broad enough to include a county. *County of Nassau v. Duesson*, 69 Misc. 184.

Section 3358 defines the term "owner" to mean "all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon." It follows that a mortgagee of property proposed to be taken is entitled to notice of the proceedings. *Matter of the Opening of Oneida Street*, 22 Misc. 240.

The remainderman as well as the life tenant are necessary parties. *In re Met. Elec. Ry. Co.*, 12 Supp. 506.

Proceedings under the right of eminent domain to acquire the possession of lands, held by tenants in common, should be against such tenants severally, so that the damages to which each may be entitled can be separately awarded and paid. *Dyckman v. Mayor of N. Y.*, 5 N. Y. 434.

One who has the control and management of property, pays the taxes thereon, and has an equitable interest in the premises, is a proper party to proceedings to acquire land, and these facts give him a right to be heard upon the question of compensation to be awarded. *Matter of Hand St.*, 52 Hun, 206, 5 Supp. 158.

The owner of a fee in a public street is a proper defendant in condemnation proceedings for the construction of a sewer in a street. *In re Wells*, 4 Supp. 301.

The owner of lands abutting upon navigable waters is a proper party to a proceeding to condemn the lands under water, as he has reparian rights therein even though he has no fee. *N. Y. C. & H. R. R. Co. v. Mathews*, 144 App. Div. 732.

When a husband and wife are seized of an estate as tenants by the entirety, a proceeding by a municipality to condemn a right of way for a sewer across the premises, in which notice is served upon the husband alone and he only appears, and which results in an award to him, does not bind the wife's interest or confer any right in the land as to her, and she can, by force of the Married Woman's Act, maintain an action, during the life of her husband, to restrain the construction of the sewer, as a threatened permanent injury to the freehold which will interfere with her possession. *Grosser v. City of Rochester*, 148 N. Y. 235.

A judgment creditor is not required to be a party. He is in no sense an owner, since upon the payment of compensation to the party taking proceedings he acquires the right of possession and use of the lands free from all judgment liens. *Watson v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 157; cited, *People v. Adirondack Rd. Co.*, 160 N. Y. 225 (243).

Under section 3361 of the Code of Civil Procedure, which provides that the petition and notice of presentation "must be served upon all the owners of property at least eight days prior to its presentation," and under section 3358 of said Code, which defines the term "owner" to include "all persons having any estate, interest, or easement in the property to be taken," it is not necessary, where the application is made on behalf of a telephone company, to condemn the right to place its poles and wires in a village street, that the municipal authorities be made parties to the proceedings, as no public right is sought to be taken therein, and as the municipality has no estate, interest, or easement in the property sought to be taken, and is not an "owner" within the meaning of said section. *New Union Telephone Co. v. Marsh*, 96 App. Div. 122, 89 Supp. 79.

The provision of section 452 of the Code which authorizes joining as defendants all persons claiming an interest in the controversy or real property involved is made applicable to condemnation proceedings by section 3382 of said Code. *N. Y. C. & H. R. R. R. Co. v. Matthews*, 70 Misc. 567.

By the provision of section 3361 of the Code, requiring service of the petition and notice of the time and place of its presentation to the court upon all the owners of the property acquired by condemnation, service upon those who claim such ownership is required; and where there are conflicting claims of ownership all persons claiming such ownership are necessary parties to the proceeding. *N. Y. C. & H. R. R. R. Co. v. Matthews*, 70 Misc. 567.

A village by instituting a proceeding to acquire lands for a sewer admits the landowner's right and cannot take the position that the lands in question form a part of a public highway. *Village of Medina v. Graves*, 113 Supp. 52.

Subd. 2. Statutory Requirements Must be Complied with.

The Condemnation Law requires that all condemnation proceedings shall be taken by petition to the Supreme Court, and all other acts and parts of acts which prescribe a different method are repealed. *Matter of Hodge*, 28 Misc. 104.

Every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceedings in order to give them validity. *In re Buffalo*, 78 N. Y. 362; *Citizens' Water-Works Co. v. Parry*, 59 Hun, 202; *aff'd*, 128 N. Y. 669; *Matter of the Village of Le Roy*, 35 App. Div. 177.

In condemnation proceedings the facts necessary to give the court or officer jurisdiction must appear in the petition, which alone is to be looked to for the facts upon which the jurisdiction depends. *Matter of Marsh*, 71 N. Y. 315, citing *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas.

107; *Sharp v. Speir*, 4 Hill, 81, and dist'g *Matter of Prospect Park & Coney Island R. R. Co.*, 67 N. Y. 371.

The court only has jurisdiction when the applicant cannot acquire title by purchase, or by the assent of the owner. The law is zealous of the rights of property, and will not permit them to be invaded under the right or color of eminent domain except upon necessity, and when title cannot be obtained by purchase and with the consent of the owner. The reasons of the inability must be stated that the court may determine their sufficiency, and also that the owner of the land may negative or disprove them, as the reasons why agreement cannot be had may be various, and a petition which fails to state the reasons for disagreement is defective. *Matter of Marsh*, 71 N. Y. 316, citing *N. Y. & B. R. R. Co. v. Goodwin*, 12 Abb. N. S. 21; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Matter of Prospect Park v. Coney Island R. R. Co.*, 67 N. Y. 371.

Section 3360 contains what is necessary to be alleged in a petition for condemning land. If the petition of a municipal corporation sets forth the lands it is necessary to acquire for the purposes of extending a city street, it is not necessary to describe any lands which the owners consent to convey to the city. If the petition sets forth that such owners have so consented to convey, the fact that certain property-owners, who had previously agreed to convey to the city, thereafter receded from their agreement, after condemnation proceedings brought against the persons who had not so agreed to convey, does not affect the regularity of the proceedings instituted, nor does the fact that such proceedings have been instituted against one person present any legal objections to a subsequent second proceeding against the lands of owners whose property it is necessary to have to complete the street opening. *City of Johnstown v. Wade*, 30 App. Div. 5 (12).

A petition in condemnation proceedings may state facts on information and belief. *Matter of Met. Elev. Rd. Co.*, 7 Supp. 707, 26 St. Rep. 968. But it seems that this rule does not apply to the statement of inability to acquire title, which must be stated as a matter of fact within the knowledge of the petitioner. *Matter of Met. Elev. Rd. Co. v. Dominick*, 55 Hun, 198, 8 Supp. 151, 27 St. Rep. 576, citing *In re Marsh*, 71 N. Y. 315.

Where a petition to have commissioners appointed complies literally with subdivision 7 of section 3360, but does not state specific facts, it nevertheless confers jurisdiction. *Rochester Rd. Co. v. Robinson*, 133 N. Y. 242, 44 St. Rep. 872, rev'g 38 St. Rep. 1022, 16 Supp. 381.

The petition should disclose the specific purpose to which it is intended to apply the lands. *Matter of N. Y. C. & H. R. R. Co.*, 5 Hun, 86; aff'd, 66 N. Y. 407.

It is not enough in a proceeding to condemn an interest in land for

public purposes to describe the interest sought to be acquired so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the *quantum* of the interest which it may be deemed necessary to take. *Bell Telephone Co. v. Parker*, 187 N. Y. 299, rev'g 115 App. Div. 920, 101 Supp. 1112.

Subdivision 3 of section 3360 of the Code of Civil Procedure, which provides that the petition shall set forth "the public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use," is satisfied by an allegation that the street is "unnecessary and useless as a public street, and is a menace to the health, safety, peace, and good order of the residents of said city of Rochester, and especially to the abutting owners thereon and will necessitate a large expense to the city in maintaining, repairing, lighting, and grading the same," that it is useless and not desired by the abutting owners therein.

The petition in such a proceeding is not defective because it fails to allege, as required by subdivision 7 of section 3360 of the Code of Civil Procedure, that the city intends "in good faith to complete the work or improvement for which the property is to be condemned," as such an allegation is not vital in a proceeding to close an alley.

The petition is not defective because it fails to state the residence of the defendant property-owner, where the latter appeared before the commissioner of public works of the city and presented and filed his claim for damages, so that his identity is established. *Matter of City of Rochester (In re Neun)*, 102 App. Div. 99, 92 Supp. 478.

A petition in a condemnation proceeding which alleges that the board of trustees of a village submitted to the owners of a water company an offer to buy its property and plant to which no answer was made; that the village has been unable to agree with the owners on a price; that upon two occasions it has requested the owners to make an offer and they have refused; that they have refused to permit an examination of their books to ascertain the extent of the property, and that they have refused and neglected to enter into negotiations for the sale of the property, sufficiently shows the inability of the trustees to agree with the owners upon a price.

An allegation that the village has endeavored to agree upon a price is a sufficient allegation that the trustees have done so. *Village of Waverly v. Waverly Water Co.*, 127 App. Div. 440, 111 Supp. 541; aff'd, 194 N. Y. 545.

Under the Code provisions requiring the petition in condemnation proceedings to allege "The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use," allegations, upon the part of the city, that the property to be taken is required for public park purposes and that the people in that

section of the city are desirous of a place to beautify their section and a place for recreation, are insufficient to authorize condemnation, even where no answer has been interposed.

The petition should also show the situation of the neighborhood, the extent of the population there, the fact, if it be so, that there is no other or sufficient place for the recreation of the people of the section and such other facts as may bear upon the necessity of the use for public purposes of the land proposed to be taken. *Matter of Meagher*, 35 Misc. 601, 72 Supp. 157.

A petition which alleges that premises occupied by a railroad company are inadequate for the carrying on of its business, and the addition of the lands sought to be condemned will be adequate and sufficient, contains facts showing the necessity of the acquisition. *Broadway & 7th Av. Rd. Co.*, 73 Hun, 7, 25 Supp. 1080, 57 St. Rep. 108. An allegation in a petition that the easements sought to be condemned are those "which now are or may be the subject of injury from the construction of said railroad, or incidental to its use," is a sufficient description of the easement to be taken. *Matter of Brooklyn Elev. Rd. Co. v. Nagel*, 75 Hun, 590, 59 St. Rep. 161, 27 Supp. 669; aff'd, 150 N. Y. 562.

A petition under the Laws of 1857 to take water for the use of a company sufficiently describes the quantity to be taken where it states the size of the pipe, its grade, and the estimated flow. *Matter of Malone Water-Works Co.*, 38 St. Rep. 95, 15 Supp. 649. A statement in a petition to acquire title to land, that the owner demands an unreasonable price, is sufficient to show a failure to agree. *Matter of Long Island Rd. Co.*, 50 St. Rep. 257, 21 Supp. 489, 55 Hun, 610. A petition must contain a statement of petitioner's intention to complete the work. *Erie & C. N. Y. Rd. Co. v. Walsh*, 1 App. Div. 140, 37 Supp. 996, 73 St. Rep. 539.

A petition under a special statute (L. 1875, chap. 686), with same clause as to failure to agree, was held sufficient where it stated that the petitioner has not been able to acquire title to said land, and that the reason of such inability is that the owner refuses to sell the same for any reasonable compensation, and that your petitioner has not been able to agree with the owner or owners of said real estate, or of any interest therein, for the sale of the same to your petitioner. It seems that a defect in the petition may be cured by proof presented upon hearing. *Matter of Suburban Rapid Transit Co.*, 38 Hun, 553. In *Matter of N. Y. Cable R. R. Co.*, 36 Hun, 356, a statement there made as to failure to agree was held insufficient under the statute under which the application was made, following *Matter of Broadway Underground Ry. Co.*, 23 Hun, 693. See *Matter of One Hundred and Thirty-eighth Street*, 60 How. 290; *Matter of Suburban Transit Co.*, 16 Abb. N. C. 152. It is held in the latter case that the defect is amendable, and that where such a general allegation is

put in issue by the opposing affidavits, the court may receive from the petitioner affidavits of the facts in support of the allegations as proofs under the issue.

Allegations that the plaintiff has attempted in good faith, but has been unable, to agree with the owners of the property for its purchase, and that the reason is that the owners "demand a sum or price therefor largely in excess of the value thereof," are a sufficient compliance with the provisions of the statute in that behalf. *Marcellus R. R. Co. v. Crisler*, 33 Misc. 1.

It is not a condition precedent to a city's right to institute condemnation proceedings for the acquisition of land for a public improvement that it should have endeavored to acquire title to the necessary lands by voluntary purchase, although authorized so to do by the statute governing the proceeding.

While it is not essential to the city's right to bring eminent domain proceedings, that minute and detailed plans, proper for the awarding of a contract, should first be prepared and approved, yet the improvement must have been planned in a general way, so that the court may see that the determination of the authorities that the land is necessary for the carrying out of the improvement is reasonably warranted. *Matter of City of New York*, 104 App. Div. 445, 93 Supp. 655, rev'g 45 Misc. 184, 91 Supp. 987.

A petition made by a railway corporation, upon an application for the appointment of commissioners to ascertain and fix the compensation of the owners of land sought to be condemned under the right of eminent domain, is defective where it does not contain, as required by subdivision 7 of section 3360 of the Code of Civil Procedure, "a statement that it is the intention of the plaintiff in good faith to complete the work or improvement for which the property is to be condemned."

Objections may be taken orally to such a petition. *Erie & Central New York R. Co. v. Welch*, 1 App. Div., 140, 37 Supp. 996.

Where there is what is termed a special estate in the lands, as for life, for years, inheritance, at will, or sufferance, the petition must state those facts. Chap. 444, § 2, Laws of 1857. Under the provisions of section 25 of the General Railroad Act, no notice is required to be given to owners of adjoining upland where application is made to the State authorities for lands under water, as such owner has no interest therein. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269, citing *Gould v. H. R. R. Co.*, 6 N. Y. 552.

The failure of a railroad company to sufficiently allege, in its petition for the right to lay and operate its railroad through a street, its incorporation; that it has paid the required sum pursuant to the Railroad Law; that it has obtained from the Public Service Commission the certificate

required by law, or, if so, that it has been filed or recorded, cannot be urged as preliminary objections, but such allegations should be embodied in an answer to the petition.

Under an allegation in the petition of a railroad company in condemnation proceedings, that petitioner has taken all the preliminary steps required by law to entitle it to institute the proceeding, proof may be given of the necessary facts showing compliance with the statute. *Dexter & Northern R. R. Co. v. Foster*, 64 Misc. 500.

The failure to state in a petition by a water company that the water was to be supplied for the extinguishment of fires and for sanitary and other public purposes is cured of the defect by the proof adduced on the trial and the finding of the court of a contract in the express terms of the statute. *New Rochelle Water-Works v. Brush*, 19 Supp. 954, 47 St. Rep. 388.

Where a petition, made by a railroad corporation under section 3360 of the Code of Civil Procedure to condemn property, states that the wife of the owner of the fee has an inchoate right of dower therein, it must also state her residence as she is an "owner" within section 3358 of said Code. *The Marcellus Electric R. Co. v. Noah B. Crisler*, 33 Misc. 1, 67 Supp. 932.

A defective condemnation of lands for school purposes cannot be sustained on the ground that the remedy of the landowner is an appeal under the Consolidated School Law, for in order to acquire the lands for school purposes the statute must be complied with. *Matter of Hemenway*, 134 App. Div. 86.

An objection is not well taken that a petition fails to show \$10,000 per mile of the proposed road has been subscribed and 10 per cent. paid in. Section 6, chapter 560, Laws of 1871, only shows \$6,000 per mile need be subscribed and 10 per cent. paid in where the road is a narrow-gauge road. *Matter of Sheephead Bay, etc., R. R. Co.*, 5 Wkly. Dig. 488.

A petitioner should not be denied because other companies owning routes refuse their consent. Inability to procure the consent of the landowners is alone necessary to authorize the application. *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343, rev'g 37 Hun, 442.

The fact that a petition contemplates the acquisition of a fee does not mean an unincumbered fee. *Matter of Bensel*, 140 App. Div. 257.

Gravel and stone are part of real estate until removed, and, hence a condemnation of the right to remove them is a condemnation of real property.

The petition to condemn such gravel and stone for the improvement of a highway should not describe the entire plot of land from which the material is to be taken, but on the contrary should locate the quarry itself by metes and bounds, as well as the right of way over which the material

is to be removed, and also those lands contiguous to a quarry in which an easement will be necessary in order to carry on operations.

But a petition should not be dismissed for failure properly to locate the quarry and the easements required. The court should permit an amendment in this respect where there has been an attempt in good faith to comply with the statute. *Maxon v. Gale*, 142 App. Div. 335.

Subd. 3. The Description of Lands.

The only property which can lawfully be taken in condemnation proceedings is the precise property described in the petition. *Village of Babylon v. Bergen*, 68 Misc. 433.

It is the duty of the petitioner in condemnation proceedings to obey the provisions of section 3360 of the Code of Civil Procedure and to implicitly and accurately follow its requirements. In doing so it is the petitioner's duty to insert in the petition an accurate specific description, with reasonable certainty, of the precise property rights sought to be condemned, to the end that the proceedings shall comply with the statute, and the property-owner be enabled by the petition to understand just what is sought to be taken from him and just what is left, if anything, after the property rights have been taken under the proceedings instituted by the petition.

It is proper to exact of a petitioner in condemnation proceedings that it should fulfill and carry out all the conditions and restrictions imposed by the legislative acts under which it seeks to derive important and valuable rights and privileges, and so far as the conditions and restrictions, found in the statute proceeded under, relate to the rights of the owners whose property is sought to be taken, the owners are entitled to have the full benefit thereof. *City of Syracuse v. Stacey*, 86 Hun, 442, 33 Supp. 929.

A petition asking the condemnation of easements for the erection of a telephone line should definitely describe the easement to be taken in order that the amount of damages may be determined and the petitioner in the future be confined to the specifications of the petition. The defendant is entitled to know the size, number, and location of the poles, and at what height and in what manner the wires are to be strung. A petition which merely asks "a right of way or easement for the plaintiff's line of telephone wires and fixtures" over the defendant's land is fatally indefinite. *Suffolk County Telephone Co. v. Gammon*, 113 App. Div. 764, 99 Supp. 295.

Where, in a proceeding under chapter 712 of the Laws of 1901 to acquire certain real estate for the construction of an extension of the Manhattan terminal of the New York and Brooklyn bridge, the petition, in one paragraph, describes generally the property sought to be acquired, as a whole, including the public streets embraced therein, and, also, prop-

erty owned by the city, and, in another paragraph, with more technical precision, describes in detail the separate parcels of the same land held in private ownership, omitting the portions owned by the city and the public streets, a motion to strike out the paragraph containing the more particular description, as irrelevant and immaterial, may be denied as matter of discretion; and, although the petition does not allege that the descriptions are identical, the court will take judicial notice of sufficient facts concerning public streets to discover that, on the face of the petition, such identity exists. *Matter of City of New York*, 48 Misc. 602, 96 Supp. 554; aff'd, 114 App. Div. 912, 100 Supp. 1110.

A petition, in a proceeding instituted by a board of water commissioners of a village under the Condemnation Law (Code Civ. Pro., §§ 3357-3384) to condemn water rights, specifically describes the property sought to be taken with reasonable certainty, as required by subdivision 2 of section 3360, where it defines it as water to be diverted from a certain river, at a specified point, in sufficient quantity to furnish a stated minimum supply per day for domestic purposes and a stated maximum supply per day for fire and emergency purposes, and when the description is amplified by reference to other portions of the petition. *Village of Champlain v. McCrea*, 165 N. Y. 264, rev'g 33 App. Div. 259, 53 Supp. 1096.

The rules governing the construction of descriptions in grants of lands bordering on waters have no application to proceedings *in invitum*, where the petitioner's acquirement is confined to the property specifically described and the rights or interest definitely set forth. *Village of Babylon v. Bergen*, 68 Misc. 433.

Under section 3360 of the Code of Civil Procedure, a petition by a railroad company for the right to lay and operate its railroad through a street need not state the degree of interest sought to be acquired in the street, whether fee, easement, or leasehold, nor need it point out to each owner the surrounding conditions and indicate how he in particular is to be affected. The petition in condemnation proceedings should specifically describe the property to be taken. *Dexter & Northern R. R. Co. v. Foster*, 64 Misc. 500.

Extreme accuracy is required in the description of the property sought to be acquired, and there must be no uncertainty in such description, or in the degree or interest sought to be acquired. *Met. Elev. Rd. Co. v. Dominick*, 55 Hun, 198.

It is said in the *Matter of the Water Com. of Amsterdam*, 96 N. Y. 360: "It has been uniformly held that in proceedings of this character, extreme accuracy is essential for the protection of the rights of all parties. There must be no uncertainty in the description of the property to be taken, nor in the degree of interest to be acquired." Citing *Matter of*

N. Y. C. & H. R. R. Co., 70 N. Y. 191. These authorities were cited and followed in *City of Syracuse v. Stacy*, 86 Hun, 441. See also cited to the same point, *People ex rel. Eckerson v. Trustees, etc.*, 137 N. Y. 88; *Hayden v. State*, 132 N. Y. 533.

In *Matter of N. Y. Central, etc., R. R. Co.*, 15 Wkly. Dig. 201, it is held that a description of the lands sought to be acquired in the petition which designates the east and west lines thereof as being those described in the deed to the present owners, and the south line to be at a specific distance from the south line of petitioner's land, was not sufficient. Stating that the price asked for the land is excessive is a sufficient statement of the reason of inability to acquire title. The petition may ask both for lands for the route and lands for building, and without giving separate descriptions. A statement that the company is a corporation, duly organized under and in pursuance of the laws of the State of New York and New Jersey, for the purpose of constructing its line of the road, and then stating how and under what law it is organized, is sufficient. The petition must state that the land is required for the purpose of constructing or operating the proposed road. *Matter of N. Y., West Shore & B. R. R. Co.*, 64 How. 216. The same case holds that an objection to the sufficiency of the petition may be raised and disposed of before trying the issues.

The petition must show such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by reference to a description in a deed. In proceedings of this character extreme accuracy is essential for the protection of the rights of all the parties, and a failure to comply with the statute must lead to difficulty and embarrassment. *Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 192. See *Matter of N. Y. C. R. R. Co.*, 20 Barb. 419.

Where, in a proceeding, the land of the owner is incorrectly described and part is omitted, this does not go to the regularity, but to the effect of the proceeding, and the petitioner does not acquire any more of the land than was expressed in the papers instituting proceedings. *Matter of Newland Av.*, 15 Supp. 63, 38 St. Rep. 796.

In a proceeding to acquire riparian rights of one whose remaining property will be cut off from said rights, it is only necessary, however, to describe in the petition the property sought to be acquired. *New Rochelle Water-Works v. Brush*, 47 St. Rep. 388, 19 Supp. 954.

The petition by an elevated railroad company to construct a railroad through a street need not show whether it is an easement or a fee of the abutting owners of the street that is sought to be condemned. *Matter of Met. Elev. Rd. Co.*, 12 Supp. 506.

Where a map annexed to the petition served upon the owners does not show their parcel, a description contained in the petition and based upon survey stations on the center line of the proposed railroad — not laid down upon the ground — does not describe with reasonable certainty the land proposed to be taken. *Marcellus Electric Railroad Co. v. Crisler*, 33 Misc. 1, 67 Supp. 932.

In such a proceeding the petition should show whether the fee is sought to be taken or only a right to overflow the land; and, in either case, the land affected should be described by metes and bounds. *Matter of Roe*, 59 Misc. 535, 111 Supp. 755.

Where a petition in condemnation proceedings, instituted to acquire title to certain property, describes the property to be taken as "an easement or right of way for the erection, maintenance, and operation of a line of telephone, said line to consist of" a designated number of poles, to be set at designated places, with the right to attach the necessary wires or cables thereto, "and with the right to trim such trees as may be necessary to protect said line from interference," the petition is insufficient because it fails to describe the property, rights, and easements sought to be acquired with sufficient particularity to be a compliance with the provisions of the Condemnation Law (Code Civ. Pro., § 3360, subd. 2), in that it is not sufficiently specific in stating the extent of the right which the petitioner desires to acquire "to trim such trees as may be necessary to protect said line from interference," since the precise distance to which such trees must be trimmed to maintain the safety of the line should be stated in the petition in order that the property-owner may be informed in advance as to the extent of the interest which the condemning party seeks to acquire, in order that the commissioners may be similarly guided in measuring their award. *Bell Telephone Co. v. Parker*, 187 N. Y. 299, rev'g 115 App. Div. 920, 101 Supp. 1112.

A paper so referred to and described that it may be identified beyond a reasonable doubt is made part of the instrument the same as if incorporated therein. So held, where schedules giving full description of real estate and the names and places of residence of owners and claimants were attached to the petition. *Held*, that they formed part of the petition and there was a sufficient compliance with the provisions of the statute. *In re Washington Park*, 52 N. Y. 131.

It is held, in *Matter of Boston, H. T. & W. R. R. Co.*, 10 Abb. N. C. 104, and *New York & Albany R. R. Co. v. N. Y., W. S. & B. R. R. Co.*, 11 Abb. N. C. 386, that a map which indicates only a single line is insufficient. A railroad company may petition for the appraisalment of the surface only of the land required for its road. *Ex parte Hartford & Conn. W. R. R. Co.*, 65 How. 133.

Subd. 4. Verification of Pleadings. § 3366.**§ 3366. Verification of petition or answer.**

A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.

Where a petition was verified by an attorney for a railroad company, and the verification stated that he was its duly authorized attorney and agent appointed by it to verify in its behalf petitions in such proceedings, it was held that the affiant was an officer of the corporation within the meaning of section 2525 of the Code, and that there was a sufficient compliance with section 3366, requiring said petition to be verified in the same form and by the same persons as pleadings in a court of record. *Matter of St. Lawrence & Adirondack Rd. Co.*, 133 N. Y. 270.

Within the meaning of the General Act, section 14, and the requirements of the Code of Civil Procedure, section 525, a general agent for the purchase of lands for obtaining right of way for a railroad corporation is an officer having authority to verify petitions in proceedings to acquire title to lands. *Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148. Inability to procure the assent of the landholders is the only prerequisite under the statute to the appointment of commissioners. An application for the appointment of commissioners should not be denied because other companies having coincident routes have refused their consent to the construction and operation of the road of petitioner as required by section 14. *Matter of Thirty-fourth Street R. R. Co.*, 102 N. Y. 343.

Subd. 5. Amendment to Petition.

The petition in condemnation proceedings may be amended by supplying a more sufficient description of the property to be taken. *City of Syracuse v. Stacy*, 86 Hun, 441, 33 Supp. 929, 67 St. Rep. 704.

The court has power in its discretion to allow defects in a petition for the appointment of commissioners in proceedings of eminent domain to be amended, if the amendment does not tend to prejudice the rights of the adverse party. *Matter of Rochester, Hornellsville, etc., Ry. Co.*, 19 Abb. N. C. 421; aff'd, 110 N. Y. 119.

Where a jurisdictional allegation is omitted in petition it cannot well be cured by amendment. *Stanards Corners Rural Cemetery Association v. Brandes*, 14 Misc. 270, 35 Supp. 1015.

Under a petition to ascertain what compensation should be paid, all parties having an interest in a street through which the railroad is to pass have a right to be heard. An application to amend the petition should be made at the Special not at the General Term. *Matter of Metropolitan Transit Co.*, 7 St. Rep. 477.

In *Matter of Application of the Rochester, etc., Rd. Co.*, 45 Hun, 126, the petition was allowed to be amended at General Term by stating the

places of residence of the persons having an interest in the property; aff'd, 110 N. Y. 119.

After an order has been made and appealed from the petition cannot be amended; proceedings are under a statute and must be strictly followed. *Matter of N. Y., West Shore & B. R. R. Co.*, 89 N. Y. 453, rev'g 27 Hun, 57.

Although in a condemnation proceeding the petition alleged that the lands were owned by the original grantor and that the wife and her husband, who was misnamed, claimed to have some interest therein, the proceeding was not thereby invalidated, if in fact the petition was amended to describe her as the owner and wife of the grantor and she appeared, claimed to be the owner, and was paid the award. *Scheer v. Long Island Railroad Co.*, 127 App. Div. 267, 111 Supp. 569.

Where the petition of a railroad company in condemnation proceedings, in describing the strip of land to be taken adjoining its right of way, excepted so much of the premises described "as is included within the lines of the highway," because petitioner's attorney was misled by the official search into the belief that the defendants had no title to the highway, and the mistake is discovered before an award is made, the petition, under section 721 of the Code of Civil Procedure, made applicable to condemnation proceedings by section 3368 of said Code, may be amended so as to include in the description of the property to be taken the highway itself. *Matter of Lake Shore & M. S. R. R. Co.*, 53 Misc. 340, 103 Supp. 294.

Where a railroad company, while an action is pending by the owners of the highway to restrain it from entering thereon, obtains an order permitting it to go into immediate possession upon depositing \$5,000, which is done, an amendment to the petition will be granted on condition that the petitioner pay all taxable costs to date in said action and also all witnesses' fees paid and taxable, on the part of the owners in the condemnation proceedings to the date of the order, together with an allowance to their attorney upon the motion to amend and as compensation for his appearance to date before the commissioners. *Matter of Lake Shore & M. S. R. R. Co.*, 53 Misc. 340.

Subd. 6. Notice and Service of Petition and Notice of Pendency. **§§ 3361, 3362, 3381.**

§ 3361. Notice to be annexed to petition; service of.

There must be annexed to the petition a notice of the time and place at which it will be presented to a Special Term of the Supreme Court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 3362. Service of petition and notice.

Service of the petition and notice must be made in the same manner as the service of a summons in an action in the Supreme Court is required to be made, and all the

provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this State, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

§ 3381. Notice of pendency of action to be filed.

Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notice of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

In proceedings under the right of eminent domain personal notice should be given to each person proceeded against. *Dyckman v. Mayor*, 5 N. Y. 434.

The notice should be given to afford an opportunity to raise questions as to the regularity of the proceedings, as that the petition was not properly verified, or that it does not appear there was a failure to agree with the owner, since it is too late to raise these objections on confirmation of the report. *N. Y. & Erie Ry. Co. v. Corey*, 5 How. 177.

Parties having liens upon the lands should have notice of the proceedings. *Watson v. N. Y. C. R. R. Co.*, 6 Abb. N. S. 91. See *Watson v. N. Y. C. R. R. Co.*, 47 N. Y. 157, *supra*, referring to another statute.

An allegation that only reasonable notice was given was held bad in an action for trespass. *Cruger v. H. R. R. R. Co.*, 12 N. Y. 190. And it is held by same authority that where a notice of appraisal is defective, nothing short of an appearance by the party whose lands are sought to be taken and actual litigation on the merits ought to be regarded as an implied waiver of the defect. The provisions of Laws of 1870, chapter 198, for publication of notice of appraisal, apply only where the owners of the adjoining lands on the line of street have the fee, and this right is sought to be extinguished. *Matter of N. Y. Central R. R. Co.*, 77 N. Y. 248. In any proceeding to condemn the private property of a citizen for a public use, all notices and hearings that may tend to give the party to be affected any semblance of benefit must be carefully observed. *People v. Kniskern*, 54 N. Y. 52. See *Mills on Eminent Domain*, § 95. In *Stewart v. Palmer*,

74 N. Y. 183, it is held in case of an assessment that it is not enough that the owner by chance have a notice, or that he may as a matter of favor have a hearing; it is a matter of substance. *Cruger v. H. R. R. Co.*, 12 N. Y., 190. A voluntary appearance and litigation on the merits waives notice. *Dyckman v. The Mayor*, 5 N. Y. 434. Notice of time and place of filing map and profile is necessary. *Wallkill Valley R. R. Co. v. Norton*, 12 Abb. N. S. 317; *Mayor of N. Y. & B. R. R. Co.*, 62 Barb. 85. But this is only required as to actual occupants and not to owners who are not occupants. *Lackawanna, etc., Co. v. Scheu*, 33 Hun, 148. Where the person on whom service was to be made, although a resident of the State, was at the time absent in Europe, *held*, that a service on a party of suitable age left in charge of the dwelling-house of such person during his absence, was in conformity with the statute. *Matter of N. Y. & Oswego R. R. Co.*, 40 How. 335.

Jurisdiction is obtained in condemnation proceedings by the service of the petition and requisite notice. Although the Legislature cannot dispense with the giving of notice in such proceedings, it may by statute prescribe the kind of notice, and the mode of giving it. *H. E. Rd. Co. v. N. Y., L. E. & W. R. R. Co.*, 83 Hun, 407, 64 St. Rep. 416, 31 Supp. 745.

It can be assumed that property cannot be taken for public purposes without giving the owner notice and an opportunity to be heard. It may also be assumed that such notice need not necessarily be personal. The Legislature may provide, within certain constitutional limits, the kind of notice required. Constructive notice may be given by publication. *Matter of Opening Oneida Street*, 22 Misc. 235 (237), citing *Owners of Ground v. Mayor*, 15 Wend. 374; *Matter of Empire City Bank v. Insurance Co.*, 18 N. Y. 199 (215); *Matter of Union E. R. R. Co.*, 112 N. Y. 62; *Lamb v. Connolly*, 122 N. Y. 531; *Matter of Common Council of Amsterdam*, 126 N. Y. 158; *Polly v. Saratoga R. R. Co.*, 9 Barb. 450.

Where a city charter provides that no notice of condemnation proceedings shall be given to any one, except such as may be derived from the publication and subsequent service upon owners or persons having an interest of a copy of the resolutions of the common council declaring that it intends to take certain property, etc.; and where the charter does not require a notice to be given that any person or party in interest can appear at any time or place, and where it provides for no notice of the proceedings before the commissioners, or any opportunity to be heard, and where no notice is required to be given of the commissioner's report, etc., the appointment of commissioners would violate the Constitution, which forbids private property being taken for public use without just compensation, and without due process of law. *Matter of Opening Oneida Street*, 22 Misc. 235.

The notice of application for the appointment of commissioners must

state when and where it will be presented. A notice which states that it will be made to the "Special Term of the Supreme Court of N. Y." on a specified day is not sufficient. *Matter of Broadway & 7th Ave. Rd. Co.*, 69 Hun, 275, 53 St. Rep. 38, 22 Supp. 609.

A railroad company by merely filing its map and profile of a proposed extension of its road and serving notice on the occupants of the land therein designated acquires no lien or property right against the State so as to entitle it to notice and compensation as an owner in proceedings by the State to condemn such land. *People v. Adirondack Rd. Co.*, 160 N. Y. 225; aff'd, 176 U. S. 335.

ARTICLE V.

APPEARANCE AND ANSWER. §§ 3363, 3364, 3365.

§ 3363. *Appearance of infant, idiot, lunatic, or habitual drunkard, 514.*

§ 3364. *Appearance, 514.*

§ 3365. *Answer; what to contain, 514.*

§ 3363. Appearance of infant, idiot, lunatic, or habitual drunkard.

If a defendant is an infant, idiot, lunatic, or habitual drunkard, it shall be the duty of his general guardian, committee, or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee, or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian ad litem for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee, or trustee, or a guardian ad litem to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

§ 3364. Appearance.

The provisions of law and of the rules and practice of the court relating to the appearance of parties in person or by attorney in actions in the Supreme Court shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices, and papers may be served upon the attorney appearing and upon a guardian ad litem in the same manner and with the same effect as the service of papers in an action in the Supreme Court may be made.

§ 3365. Answer; what to contain.

Upon presentation of the petition and notice, with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief or a statement of new matter constituting a defense to the proceeding.

A general appearance and filing an answer confers jurisdiction over the party. Such party, having appeared generally, cannot object to the petition on the ground that it is not properly verified. *In re N. Y., Lackawanna & Western R. R. Co.*, 33 Hun, 148.

The appearance of an attorney for the landowner, when a petition for the appointment of commissioners is brought on for hearing, gives juris-

diction, and cures an omission from the petition, such as the omission to state the residence of owners. *Matter of Rochester, Hornellsville, etc., Ry. Co.*, 19 Abb. N. C. 421.

Objection to an order appointing commissioners that it fixed date for first meeting is waived by appearance of defendant and his proceeding without raising the objection. *Postal Telegraph Cable Co. v. Bruen*, 39 Supp. 220.

The general appearance of a landowner in a proceeding instituted under the act of 1901 operates to confer jurisdiction of his person upon the court and is a waiver by him of any question as to the sufficiency of the published notice by which the proceeding was instituted. *County of Orange v. Ellsworth*, 98 App. Div. 275, 90 Supp. 576.

Where the petitioner fails to comply with the provisions of section 3360, the court may properly sustain oral objections to the application. *Erie & Cent. N. Y. Rd. Co. v. Walsh*, 1 App. Div. 140, 37 Supp. 996, 73 St. Rep. 539.

It may be shown on presenting the petition that it is not properly verified, or that it does not appear that the company has been unable to agree with the owner. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177.

The objection that neither the petition nor the map filed in the office of the county clerk shows what extent of land was to be taken, or anything more than a line showing the direction of the proposed railroad, should be raised on presentation of the petition. *Matter of N. Y. & Jamaica R. R. Co.*, 21 How. 434. The point may be raised that neither the petition nor map referred to in the petition, as filed in the county clerk's office, shows what extent of land is to be taken, or anything more than a line indicating the direction of the proposed railroad. *Matter of Buffalo & S. L. R. R. Co. v. Reynolds*, 6 How. 96.

The fact that a petition contains a more or less ambiguous recital not required by the statute which might be construed to contradict an averment therein is not available to defeat the proceeding. *County of Orange v. Ellsworth*, 98 App. Div. 275, citing *Rochester Ry. Co. v. Robinson*, 133 N. Y. 242; *Williamson v. Wager*, 90 App. Div. 190.

When the material allegations in the moving affidavit or verified petition in a special proceeding are not denied by some counter affidavit, they stand sufficiently proved for the purposes of the ultimate order. *Matter of Petition of N. Y., L. & W. R. R. Co.*, 99 N. Y. 12.

Section 3365 of the Code of Civil Procedure does not require the defendant in condemnation proceedings to state the value of the property in his answer. *Matter of Niagara, Lockport & Ontario Power Co.*, 111 App. Div. 686 (690), 97 Supp. 853.

In a proceeding for the condemnation of real property, if a defendant interpose an answer to the petition (Code Civ. Pro., § 3365), a trial of the

issues thus raised must be had. *N. Y., O. & W. Ry. Co. v. McBride*, 45 Misc. 516, 92 Supp. 31.

In such a proceeding, an objecting landowner who, by a verified answer, puts in issue certain facts alleged in the application, and denies that any power has been given to take the land in question for the reason that it is already occupied for a public purpose, is entitled to have the questions thus presented decided before commissioners of estimate and assessment are appointed to determine and assess the damages. *Matter of the Mayor*, 22 App. Div. 124, 47 Supp. 965.

The provisions of section 3380 of the Code of Civil Procedure were intended to permit the plaintiff in condemnation proceedings to obtain possession of the property condemned, upon depositing a sufficient amount to fully compensate the owner; and, where the owner interposes an answer grossly overstating the value of the lands sought to be taken, the court is not bound thereby, but will treat the answer as though no value were stated therein. *N. Y. C. & H. R. R. Co. v. Lally*, 62 Misc. 506, 115 Supp. 897.

The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use, under the right of eminent domain; it is a fact which it is compelled to allege in proceedings to acquire title to lands, and which may be controverted. *Matter of B., W. & N. Ry. Co.*, 72 N. Y. 245.

It is no objection to the proceeding to acquire lands for railroad purposes, that there are other lands in the same vicinity equally well adapted for the purpose, which possibly might be acquired by purchase. The location of the buildings and structures of the company is within the discretion of its managers, and courts will not supervise it ordinarily. *In re New York & H. R. R. Co. v. Kip et al.*, 46 N. Y. 546.

In proceedings by a railroad corporation to acquire title to lands, the petition averred the due incorporation of the petitioner. A counter affidavit denied any knowledge or information sufficient to form a belief as to the truth of said averment. *Held*, that considering this simply as an answer there was no such denial as put the petitioner to proof of its incorporation, as under the Code of Civil Procedure (§ 1776) a corporation plaintiff is not required to prove its corporate existence unless the answer contains an affirmative allegation that plaintiff is not a corporation; that, therefore, conceding the landowner might, without a formal denial, disprove the fact, the burden was upon it of proving the petitioner was not a corporation. *Matter of Petition of N. Y., L. & W. R. R. Co.*, 99 N. Y. 12.

An answer in condemnation proceedings which contains a denial of any knowledge or information sufficient to form a belief as to the allegation that petitioner is a corporation, raises an issue which the petitioner must

meet by proof, and such issue is not waived by the admission on the trial that the petitioner's officers were as stated in the petition. *Matter of Broadway & 7th Ave. Rd. Co.*, 73 Hun, 7, 57 St. Rep. 108, 25 Supp. 1080.

The mere fact that the land proposed to be taken for a public use is not needed for immediate purposes is not necessarily a defense to proceedings to condemn. *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251.

A second application for condemnation upon the setting aside of a finding of the commissioners in the first condemnation proceedings is a continuance of the original proceeding, and the addition of the receiver of a condemning company as a party, he having been appointed in the meantime, does not make it necessary to file a new petition nor give the owners of the land the right to file an answer. *Rochester, H. & L. R. Co. v. Hartshorn*, 4 Silvernail, 92, 7 Supp. 279.

ARTICLE VI.

POSSESSION OF PROPERTY PENDING THE PROCEEDING. §§ 3379, 3380.

§ 3379. *Party in possession may stay on giving security*, 517.

§ 3380. *Temporary possession pending proceedings*, 517.

§ 3379. Party in possession may stay on giving security.

At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceedings; and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same.

When the final award to any owner is less than fifty dollars, in proceedings to condemn a right of way, for telephone or telegraph poles and wires, the allowance of costs, if any, and the amount thereof not exceeding that prescribed by statute, shall be in the discretion of the court in any action or proceeding that may have been or may hereafter be stayed, if the telephone or telegraph poles and wires, in such action or proceeding so stayed, shall have been erected for more than three years prior to the commencement thereof.

§ 3380. Temporary possession pending proceedings.

When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceedings, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as the judgment in the Supreme Court; and the possession of the property shall be restored to the defendant.

The purpose of section 3379 is to provide for the protection of a plaintiff's possession of property sought to be condemned, during the pendency of the proceedings taken for that purpose; it does not authorize the court to grant, after an order confirming an award has been entered, an order forever restraining the defendants in such proceedings from maintaining actions in respect to the property.

Where the final order has been entered and the award has been made or deposited, the plaintiff is entitled to the possession of the property condemned, and the defendants, in case they appeal, are required to stipulate not to disturb the plaintiff's possession during the pendency of the appeal. *Manhattan Ry. Co. v. Taber*, 78 Hun, 434, 29 Supp. 220.

Section 3379 is constitutional. *Matter of St. Lawrence & Adirondack R. R. Co.*, 66 Hun, 306, citing *Matter of St. Lawrence & Adirondack R. R. Co.*, 133 N. Y. 270, as assuming the constitutionality of the act. The latter case holds that where a railroad company has unlawfully entered upon land under no pretense or claim of right, in defiance of the will of the owner, under no mistake or misapprehension and without color of authority, and thereafter commences proceeding to acquire title by condemnation, it is not within the provisions of the section empowering the court in condemnation proceedings to authorize the plaintiff to continue in possession, and providing that the court may stay all actions and proceedings. In 66 Hun, 306, *Matter of St. Lawrence & Adirondack R. R. Co.*, 133 N. Y. 270, is distinguished, and it is held that where the court states in its order that it appeared to its satisfaction that the plaintiff is in possession of the premises sought to be condemned, it is to be assumed on appeal that the court reached the conclusion that the company was in possession under a color of claim, or had acquired possession in good faith.

The Condemnation Law (Code Civ. Pro., § 3379) does not authorize the court to restrain owners of premises sought to be condemned from maintaining a right of action which accrued prior to the commencement of the condemnation proceedings. *Waite v. Hudson Valley Co.*, 43 Misc. 304, 88 Supp. 825.

Immediate possession of condemned lands will be awarded under section 3380 of the Code of Civil Procedure if public interests will be prejudiced by delay, upon the petitioner paying the proper value of the lands into court, even though the answer of the respondent in the proceedings to condemn lands fails to state the value of the lands as contemplated by said section.

Said section is to be construed in the light of its purpose, which is to enforce an immediate possession of lands condemned when public interest will be prejudiced by delay, and the contestant in such proceedings by refusing to set a value on the lands, by answer or otherwise, cannot be permitted to defeat the object of the statute.

A deposit of the fair value of the land, as shown by the petitioner by affidavits founded on its assessed value, is sufficient when the contestant at the request of the court refuses to set a value.

Section 3380 of the Code of Civil Procedure does not violate section 6 of article 1 of the State Constitution by authorizing the taking of lands without due compensation. The section is intended to insure to the owner the payment of the value. *Matter of Niagara, Lockport & Ontario Power Co.*, 111 App. Div. 686, 97 Supp. 853.

The court has no power under the provisions of section 3380 of the Code of Civil Procedure to permit a railroad company to take immediate possession of real estate, pending proceedings instituted by the company to condemn it, upon depositing less than the amount stated in the answer as the value of the property. *Matter of New York, W. & Boston Ry. Co.*, 51 Misc. 333, 100 Supp. 388.

It is only upon the payment of the compensation that the plaintiff may either enter into the possession of the land or occupy it. Until the amount fixed by the judgment has been paid to the landowner, the plaintiff in the condemnation proceeding has no right of entry or occupation. *State Water Supply Commission v. Curtis*, 192 N. Y. 319 (329), aff'g 125 App. Div. 117, 109 Supp. 494.

Under the former statute the Supreme Court had power to make an order or issue process to put a railroad company in possession of lands acquired by proceedings under the general act. The object of the amendment was to give the court the same power in such proceedings to carry into effect the object and intent of the act which they had to carry into effect their own judgments and decree, and to assimilate the practice to that established in actions. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116. The authority of this section was not necessary to enable the court to carry out the powers conferred on it by the General Railroad Act; such a power was incident to the grant of powers under that statute, and enlarged construction should be given to the authority conferred. The order is in the nature of a writ of assistance. *Matter of N. Y. C. & H. R. R. Co.*, 2 Hun, 482; aff'd, 60 N. Y. 116. See, also, *Matter of Rhinebeck & Conn. R. R. Co.*, 8 Hun, 34; s. c., 67 N. Y. 242.

Moneys deposited by a city with a trust company pursuant to section 17 of chapter 490, Laws of 1883, accompanied by an order for the payment of interest to the life tenant of the property taken and distribution of the principal on her death to the persons entitled hereto, remain subject to the orders of the court, which may direct their transfer to a county treasurer who will secure a higher rate of interest, but this can only be done on notice to the remaindermen. *Matter of Newton*, 26 App. Div. 547, 50 Supp. 543, 84 St. Rep. 543.

By the Condemnation Law (Code Civ. Pro., §§ 3357-3384), the pos-

session of land sought to be condemned is only assured to a party already in possession of the land. If not in possession, possession will only be given by the court, prior to actual condemnation, after the defendant's answer in the condemnation proceeding is interposed, and then only by a deposit in court of the amount of damages claimed in said answer. While these statutes do not assume to limit the court in the exercise of its equitable discretion, they indicate the policy of the Legislature, which should be a guide to the court in the exercise of that discretion, and to this extent create a limitation upon its power. *Peck v. Schenectady Ry. Co.*, 67 App. Div. 359 (362), 73 Supp. 794; aff'd, 170 N. Y. 298.

The intent of the Legislature was to permit the plaintiff to obtain possession upon the payment of a sufficient sum to compensate the owner fully; and if the conduct of the defendant, whether in good faith, inadvertently or maliciously, renders a strict compliance with section 3380 impossible, the general authority conferred upon the court by section 3382 is sufficiently comprehensive to enable the obvious purpose to be accomplished. *Matter of Niagara, Lockport & Ontario Power Co.*, 111 App. Div. 686 (690), 97 Supp. 853.

ARTICLE VII.

TRIAL AND JUDGMENT. §§ 3367, 3369.

§ 3367. *Trial of issues*, 520.

§ 3369. *Judgment; costs when to defendant; commissioners*, 520.

§ 3367. *Trial of issues.*

The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under the title.

§ 3369. *Judgment; costs when to defendant; commissioners.*

Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk at the same rates as are allowed, of course, to a defendant prevailing in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property or some part of it is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for

the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district such commissioners shall be residents of the county where the real property, or some part of it, is situated, or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

The Condemnation Law, contained in the Code of Civil Procedure (§§ 3357 to 3384), provides that the court is to try any issue, made upon proceedings for the condemnation of property, or it may refer the same, and, if the petitioner prevails, a judgment shall be entered adjudging that the condemnation of the property described is necessary for the public use. *Citizens' Sav. Bank v. Town of Greenburgh*, 173 N. Y. 215 (229).

In condemnation proceedings the issues are to be framed and tried as in ordinary actions. An answer in the form prescribed by section 3365 raises an issue and a corporation seeking to proceed must meet it by proof. *City of Syracuse v. Benedict*, 86 Hun, 393, citing *Matter of Broadway & 7th Ave. R. R. Co.*, 73 Hun, 13.

Objections to a petition pertaining to defects of minor import which could be readily supplied should be raised specifically and not be concealed in general objections of a jurisdictional character. *Matter of City of Rochester (In re Neun)*, 102 App. Div. 99, 92 Supp. 478.

In proceedings for the condemnation of real property, questions as to the sufficiency of the petition must be raised when the petition is presented and before the order appointing the commissioners is made. *Matter of Bd. of Supervisors*, 57 Misc. 665.

While there is no specific provision in the Condemnation Law (Code Civ. Pro., § 3357 *et seq.*) for questioning the sufficiency of a petition in condemnation proceedings by objection on the part of the property-owner, such method of procedure has been sanctioned by the courts for many years. *Bell Telephone Co. v. Parker*, 187 N. Y. 299, rev'g 115 App. Div. 920, 101 Supp. 1112.

If the petition does not state the facts required by the section to be stated, an objection in that regard can be raised preliminarily in effect by way of demurrer, and should be disposed of before proceeding to the merits. If such objection is well taken, the proceeding is dismissed, unless a proper cause for amendment is shown. If such objection is overruled, then any defense to the proceeding by way of denial of facts in the petition or new matter outside may be set up by affidavit or answer, and the issues so formed are to be tried. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217.

Where the purpose for which the land is to be appropriated is partly

legal and partly illegal and cannot be determined how much of the property is necessary for the legal purpose and how much for illegal purposes, the proceeding will be dismissed. *In re Metropolitan El. Co.*, 12 Supp. 506.

When a petition, which institutes proceedings for the condemnation of real property, is properly and duly presented to the Supreme Court, that court is required, if no sufficient cause is shown in opposition, to make an order appointing commissioners to ascertain the compensation to be made to the property-owner; and, when their report comes on to be confirmed by the court, then is the time for judicial action upon it, either confirming it, or in setting it aside for irregularity or for error of law in the proceedings. *Matter of Southern Boulevard R. R. Co.*, 146 N. Y. 352.

The allegation in the answer of the party whose land is sought to be condemned that it is not the intention of said railroad company in good faith to construct said proposed road puts the burden of proof on the petitioner. *In re Staten Island Rapid Transit Co.*, 20 Wkly. Dig. 15.

The burden of proof rests upon the petitioner to prove allegations which are denied by the answer. *City of Syracuse v. Benedict*, 86 Hun, 343, 33 Supp. 944, 67 St. Rep. 614.

In condemnation proceedings, an objecting landowner, who, by verified answer, puts in issue certain facts alleged in the application, and denies that any power has been given to take the land in question for the reason that the land is already occupied for a public purpose, is entitled to have the question thus presented decided before commissioners of estimate and assessment are appointed to determine and assess the damages. *Matter of Mayor*, 22 App. Div. 124, 47 Supp. 965, 81 St. Rep. 965.

Where in a proceeding for the condemnation of real property an answer is interposed and an order made appointing a referee to hear and determine the issues and the referee's report disposes of the issues and orders judgment to be entered accordingly, judgment may be entered upon filing the report without further application to the court. *Erie & Jersey R. R. Co. v. Brown*, 57 Misc. 161, 107 Supp. 981; aff'd, 123 App. Div. 655, 107 Supp. 989.

In condemnation proceedings instituted by a railroad company, the burden is on the petitioner to show the necessity of acquiring the property, its intention to complete the road, and its endeavor in good faith to agree with the property-owners, while the burden is on the owners as to an issue raised by the answer concerning petitioner's incorporation. *In re Met. El. R. R. Co.*, 12 N. Y. Supp. 506, O'Brien, J.

The provision of section 1776 of the Code of Civil Procedure that, "In an action brought by or against a corporation the plaintiff need not prove upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or the

defendant, as the case may be, is not a corporation," has no application to a proceeding instituted by a corporation for the condemnation of land; but, by force of section 3365 of the Code, an answer in such a proceeding which contains a denial of any knowledge or information by the defendant sufficient to form a belief as to the allegation of the petition in regard to the petitioner being a corporation raises an issue which the petitioner must meet by proof. *Matter of B'dway & 7th Ave. R. R. Co.*, 73 Hun, 7, 25 Supp. 1080, dist'g 99 N. Y. 12.

The legal existence of the corporation is at the foundation of its right to acquire property under the right of eminent domain; it is a fact which it is compelled to allege in its petition, and which may be controverted. If, therefore, by non-performance of a condition of its charter, the corporation has forfeited or lost its corporate rights and powers, the fact may be averred by any one whose land or property is sought to be appropriated in answer to the application. So held on reversing order appointing commissioners of appraisal. *Matter of Brooklyn, etc., R. R. Co.*, 72 N. Y. 245. It is held that it is not competent to inquire into an alleged improper issue of stock, if it appears that valid subscriptions to the extent required by the statute have been made, and 10 per cent. thereon paid in cash. *Matter of Staten Island Transit Co.*, 38 Hun, 381. Where the petition averred the due incorporation of petitioner, and a counter-affidavit denied any knowledge or information sufficient to form a belief, *held*, that, considered simply in an affidavit, it was not a denial of the averment, that, treated as an answer, there was not such a denial as put the petitioner to proof of its incorporation (Code, § 1776); that, therefore, conceding that the landowner might, without a formal denial, disprove the fact, the burden was upon him of proving that the petitioner was not a corporation. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, aff'g 35 Hun, 220.

Where a railroad company makes application to acquire land, in addition to what is required for its roadway, and objections are made by the owner coupled with a denial of the specific allegations of the petition, respecting the purposes for which the road is required, the burden is upon the petitioner of proving the special circumstances alleged in support of the averment that it requires the land. The provision of the act authorizing the landowner to disprove the allegations of the petition was intended to enable him to introduce proof on his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved. As to the special circumstances lying within the knowledge of the petitioner, it is put to its proof if the owner show sufficient cause against the petitioner. *Matter of N. Y. Central R. R. Co.*, 66 N. Y. 407. It is, however, said, in *Matter of Petition of N. Y. Bridge Co.*, 4 Hun, 635, that the burden of proving by legal evidence that the facts alleged in

the petition are not true is by this section cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose.

The party whose land is taken and who claims damages therefor has the right to the opening and closing argument in the proceedings; the rule is that the party entitled to unliquidated damages, there being no other issue, has the right to open and close. *Matter of N. Y., L. & W. R. R. Co.*, 33 Hun, 148; aff'd without opinion, 98 N. Y. 664.

There is no provision for notice of trial in condemnation proceedings, section 3367 of the Code of Civil Procedure providing that the court shall try the issues at such time and place as it may direct, or that it may order the same to be referred to a referee to hear and determine. *Erie & Jersey R. R. Co. v. Brown*, 123 App. Div. 655 (656), 107 Supp. 989.

When the petition of a railroad corporation seeking to condemn lands in the city of New York for the use of its road and terminal station shows that all the preliminary steps required by law have been taken, and that certain lands are necessary to such construction, the mere fact that the map showing the route as approved by the board of rapid transit commissioners does not include said lands is no reason for refusing a reference to determine whether such lands are necessary. *Hudson & Manhat. R. R. Co. v. Wendel*, 112 App. Div. 822, 93 Supp. 341; aff'd, 186 N. Y. 535.

In proceedings by the city of Buffalo under section 417, etc., of the charter (L. 1891, chap. 105), to acquire title to the bed of the river, the Legislature left the question of the propriety and necessity of acquiring such lands to the determination of the city; and it is not necessary in the proceeding to furnish proof of the necessity for acquiring such lands. *Matter of City of Buffalo*, 189 N. Y. 163, rev'g 116 App. Div. 555, 101 Supp. 966.

It is held, in *Matter of City of Buffalo*, 15 Supp. 123, 39 St. Rep. 417, that a statement in a proceeding to acquire the fee in a street, and that the lands were to be used for public purposes, is conclusive as to the purposes for which they are to be used, and that the owners cannot show that the common council intended to acquire title for the benefit of a railroad company.

Where the court failed to appoint commissioners or to fix a date for the hearing, it was held that it had power by section 3369 of the Code to supply the omission. *Matter of Manhat. Ry. Co. v. Stroub*, 68 Hun, 90, 52 St. Rep. 44, 22 Supp. 602. It was held that an order appointing commissioners, granted five days before the time for the first hearing and entered three days before that time, did not give sufficient time to those who had appeared, under the requirements of section 3369 of the Code. *Manhat. Ry. Co. v. Stroub*, 68 Hun, 90, 52 St. Rep. 44, 22 Supp. 602.

Transportation Corporations Law confers upon a telephone corporation a franchise direct from the State to use the public streets and high-

ways of the State for the erection and maintenance of its lines; and the corporation has authority to take proceedings to condemn the right to place its poles and lines in a village street, the fee of which is in the abutting owners. The corporation should not be permitted to take the fee of any land in the street but only an easement for its poles and a right of way for its wires. The fact that in the petition the corporation asks permission to condemn the fee does not require the dismissal of the proceedings. Nor is the failure of the corporation to show that the local authorities have approved the erection of the poles and wires at the place in question fatal thereto, although it seems the better practice is to have such approval precede the condemnation proceedings. *New Union Telephone Co. v. Marsh*, 96 App. Div. 122, 89 Supp. 79.

Where a village in need of a water system has duly voted and bonded itself for one and filed a map and plans therefor in the proper offices, embracing the only adequate supply existing in the immediate vicinity of itself and of an adjacent village, it cannot, in equity, be prevented from condemning the lands containing the supply upon a disagreement as to price with a corporation organized, under the Transportation Corporations Law, in the other village, as alleged, to supply it with water, and which has bought the said lands, where it appears that that corporation has filed no map of them under the statute, has entered into no valid contract with its village binding it to supply that village with water, has, therefore, in no manner devoted the lands to the public use, and that the corporation was organized two months after the first named village had filed its map and plans in order to thwart it from acquiring the water supply. *Village of Fultonville v. Fonda W. W. Co.*, 35 Misc. 426, 71 Supp. 1009.

Section 3367 of the Code of Civil Procedure, providing that issues raised by the petition and answer in condemnation proceedings may be tried and determined by the court or a referee appointed for that purpose, applies only to issues involving facts essential to be shown as a basis for instituting the proceeding. It is not the meaning of the section that an issue of title framed by such pleadings should be sent to a referee for determination. The Supreme Court has, however, general jurisdiction of the proceeding, and where an issue of title was referred, with other issues, by stipulation of the parties in open court, and the question tried and determined by the referee without objection, the judgment entered upon his report is binding upon the parties, so far as jurisdiction is concerned.

The fact that the referee decided that the defendant was the owner of all of the premises in question, even if correct, does not sustain a finding that the condemnation proceedings should be dismissed. The petitioner should be allowed to continue the proceeding for the purpose of acquiring all the defendant's title, whether it was the ownership in fee or not, even if it were necessary to amend the petition. *City of Geneva v. Henson*, 195 N. Y. 447, rev'g 121 App. Div. 893, 105 Supp. 1110.

Although section 3367 of the Code of Civil Procedure does not authorize a question of title to be tried before a referee appointed in condemnation proceedings, the issue may be so tried on stipulation of the parties. *City of Geneva v. Henson*, 140 App. Div. 49, 124 Supp. 588.

ARTICLE VIII.

HEARING BEFORE COMMISSIONERS. § 3370.

Subd. 1. General powers and duties of commissioners, 526.

§ 3370. *Duties and powers of commissioners*, 526.

Subd. 2. Evidence, 530.

Subd. 3. General rules as to allowance of damages, 536.

Subd. 4. Right to allow for prospective benefits, 542.

Subd. 5. Value of structures on the premises, 546.

Subd. 6. Condemnation for water supply, 548.

Subd. 7. Condemnation for municipal purposes, 551.

Subd. 8. Condemnation for railroad purposes, 554.

Subd. 1. General Powers and Duties of Commissioners. § 3370.

§ 3370. Duties and powers of commissioners.

The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners, on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the Supreme Court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses, to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court.

It is not necessary when three commissioners are appointed to ascertain the compensation that all should agree, when all are notified a majority may act; and in the absence of proof to the contrary, the giving of notice will be presumed. *Astor v. Mayor*, 62 N. Y. 580.

The Constitution does not require that three commissioners shall concur in the estimates of the compensation to be made; the Legislature may make the concurrence of two as valid and effectual as that of all. *Matter of Mayor*, 34 Hun, 441; *aff'd*, 99 N. Y. 569.

Proceedings before commissioners appointed in condemnation proceedings are not conducted on the strict lines of trials before courts. *Matter of Staten Island & Midland R. R. Co.*, 22 App. Div. 366, 48 Supp. 274, 82 St. Rep. 874.

The commissioners may re-examine the premises after the matter has been submitted for their decision. *Matter of N. Y., L. & W. R. R. Co.*, 33 Hun, 148.

In considering the proceedings of the commissioners, every intendment is in favor of their action which is not determined solely by the evidence, as they may view the premises to assist them in reaching a conclusion. *Manhat. R. R. Co. v. O'Sullivan*, 6 App. Div. 571, 40 Supp. 326; aff'd, 150 N. Y. 569.

In reaching their conclusion as to the value of a given piece of property, the commissioners are guided by their own judgment and experience, rather than by the opinion of witnesses; and are untrammelled by technical rules of evidence and unrestricted as to their sources of information. *Matter of Town of Guilford*, 85 App. Div. 207, 83 Supp. 312.

The rule is well settled that commissioners appointed in condemnation proceedings will not be governed in regard to the admissibility of evidence by the strict rules obtaining in a court; they may view the premises and act on the knowledge thus acquired, unless they have pursued a course which has plainly been detrimental to the interests of the party appealing, and unless their award is manifestly unjust, it will not be interfered with. Commissioners are not to be governed exclusively by the evidence produced before them; they have a wider range and a larger discretion in receiving evidence than courts, and may base their conclusions upon a personal inspection of the premises. *In re N. Y. El. R. R. Co.*, 8 Supp. 707.

Where property is taken *in invitum* for public purposes, the owner is entitled to just compensation, and ordinarily, if not always, it is provided that the commissioners may personally view the premises, and in such cases they may take into consideration their personal view of the land, and may act upon information derived *dehors* the record, and are neither bound nor limited by the testimony of the experts; but those cases are not analogous to a claim created by a statute which makes no provision for a personal view of premises by the commissioners, but only for its determination on sworn evidence. *People ex rel. City of New York v. Stillings*, 138 App. Div. 168 (172).

In *Matter of Bd. of Water Com'rs*, 71 App. Div. 544 (555), Justice Jenks discusses the powers of commissioners in condemnation proceedings, citing numerous authorities, and holding that the commissioners while not a law unto themselves are nevertheless clothed with not merely the functions of a jury, but that they are restricted to no peculiar species of

evidence or any peculiar sources of information. They may collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of the like kind where his own interests are involved in the inquiry. They may seek light from other minds that they may be the better able to arrive at just conclusions, but at the last they must be governed by their own judgment, arriving at the conclusion that an award by commissioners will not be set aside for inadequacy or because excessive unless the award is palpably wrong in either respect. *Rev'd*, 176 N. Y. 239, upon ground commissioners adopted wrong basis of valuation.

The commissioners appointed to assess damages in condemnation proceedings must be governed by their own judgment in determining the damages to landowners, though they may collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of like kind where his own interests are involved. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036.

Commissioners have a right to view the premises in question and are entitled to act to some extent upon their judgment. *Matter of Metropol. El. R. R. Co.*, 76 Hun, 375, 27 Supp. 756, 59 St. Rep. 194. They may disregard the testimony of witnesses and base their conclusion on knowledge and information derived from a view of the premises. *In re Kings Co. El. R. R. Co.*, 15 Supp. 516; *In re Dept. of Public Parks*, 6 Supp. 750.

While the knowledge and the experience of individual commissioners as to the value of property sought to be taken in condemnation proceedings may undoubtedly be applied to the evidence before them, they cannot go outside the record evidence in making their awards. *Matter of City of N. Y.*, 67 Misc. 191, 122 Supp. 660.

While the commissioners are required to view the premises as well as hear the proofs and allegations of the parties, they are to act upon their view as well as the evidence. *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169. An award made without testimony would be regular. The commissioners must decide according to their own judgment. *Rondout & Oswego R. R. Co. v. Deyo*, 5 Lans. 298; *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187.

In condemnation proceedings instituted by an elevated railroad corporation the commissioners may view the premises in their investigation into the damages sustained and seek information wherever it is to be found. *Matter of Brooklyn Union El. R. R. Co.*, 113 App. Div. 817, 99 Supp. 222; *aff'd*, 188 N. Y. 553.

The commissioners in condemnation proceedings may view the premises for the purpose of fixing the damages, and are not confined to the evidence adduced at the hearing. *Manhat. Ry. Co. v. Comstock*, 74 App. Div. 341, 77 Supp. 416.

Commissioners are authorized to inspect the property, and their finding will not be disturbed unless it is apparent that injustice has been done. In making the award they are not bound by the evidence of experts, but may act upon their own conclusion derived from such inspection. *Matter of N. Y. El. Ry. Co.*, 35 St. Rep. 944, 12 Supp. 858; *Matter of the Dept. of Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

Commissioners appointed in condemnation proceedings may properly be influenced in their appraisal by their conclusions reached from their personal inspection and examination of the premises. *Matter of Daly*, 26 App. Div. 326, 49 Supp. 795, 83 St. Rep. 795.

The commissioners are required "to view the premises and hear the proofs and allegations of the parties;" having done this, they are required "without any unnecessary delay to determine the compensation which ought justly to be made." The order in which they shall proceed is a matter left entirely to their discretion. They have no right to omit to hear the proofs and allegations of the parties, but whether they shall hear the proof before or after viewing the premises is for them to decide; so as to whether one party or the other shall be first heard is for them to determine, and the parties are concluded by their decision. *Albany Northern, etc., R. R. Co. v. Lansing*, 16 Barb. 68.

Where several adjournments were had on account of the failure of the landowner to appear, the commissioners were justified in taking testimony, and a motion to open the default was properly denied. *Matter of Met. Ry. Co.*, 72 Hun, 638, 25 Supp. 399, 55 St. Rep. 760. The power to adjourn rests in the majority of the board, or the commissioners. *In re Newland Ave.*, 15 Supp. 63, 38 St. Rep. 796.

It is the right of the landowner to produce before the commissioners, and the duty of the commissioners to hear, any and all evidence which would be competent in a court of law on similar questions. *Rochester & Syracuse R. R. Co. v. Budlong*, 6 How. 467. And the owner is entitled to full opportunity to be heard. *N. Y. & Erie R. R. Co. v. Colburn*, 6 How. 223.

It is the duty of the commissioners of appraisal to receive evidence relating to the condition of the properties down to the time of the trial and to note the effect thereon of the work in fact done at that time. Evidence as to the physical injuries which have actually been inflicted and can be seen, touched, and measured is competent and should be received. All lawful damages caused by the proper conduct of the work contemplated by the statute may be included in the award, and the interest and convenience of all parties will be best subserved by that method. *Matter of Rapid Transit R. R. Com'rs*, 197 N. Y. 82, modif'g 128 App. Div. 103.

An award for damages to a house taken in part for a street opening will not be set aside merely because a house two doors away, testified to be of

the same value and from which the same amount of frontage was taken, was allowed \$500 more, as the commissioners are not bound by testimony, and can act upon a personal view of the premises. *Matter of Washington Ave.*, 34 Misc. 655.

Commissioners appointed in condemnation proceedings have no authority to determine conflicting claims of title to the lands to be condemned. Their sole function is to determine the just compensation to be paid; and, having paid that into court, it is for the court itself to determine issues as to title, as provided in section 3378 of the Code of Civil Procedure. *N. Y. C. & H. R. R. Co. v. Mathews*, 144 App. Div. 732.

Subd. 2. Evidence.

Commissioners are not bound by any narrow or technical rules of evidence. *Matter of Brooklyn Union El. R. R. Co.*, 113 App. Div. 817, 99 Supp. 222; aff'd, 188 N. Y. 553; *Matter of Town of Guilford*, 85 App. Div. 207, and cases cited.

The admission of evidence which could not be received by the court is not necessarily fatal to the determination of commissioners of appraisal. *Matter of El. Ry. Co.*, 29 St. Rep. 190, 8 Supp. 707.

Commissioners appointed to appraise land taken for the purposes of an elevated railroad are not bound in the reception of evidence by the strict rules obtaining in a court, and their award will not be set aside on account of technical errors when it does not appear that substantial injustice has been done.

The award will not be set aside for errors in admitting the opinions or conclusions of certain witnesses as to the damage done, where they do not show that the commissioners adopted a wrong principle in estimating the damages. *In re N. Y. El. R. R. Co.*, 15 Supp. 909.

Where land used for business purposes is taken, the owner is entitled to show the general character of the business, but not the profits resulting therefrom. *Matter of Gilroy*, 26 App. Div. 314, 49 Supp. 798, 83 St. Rep. 798.

In a proceeding by the city of New York to acquire the right of a person entitled to use, for mill purposes, the outlet of a lake, desired by the city for the protection of its water supply, evidence of the value of the defendant's right with reference to the utility of the lake as a water power is competent; but evidence as to the value of such right with reference to the utility of the lake for storage purposes or as to the value of the water of the lake to the city is incompetent. *Matter of Daly*, 72 App. Div. 394, 76 Supp. 28; appeal dism'd, 173 N. Y. 640.

Affidavits of landowners as to the relative value of distinct parcels of land proposed to be taken are not competent evidence before the commissioners to assess the damages and will not be considered by the court

upon motion to confirm the report of commissioners. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036; aff'd, 130 App. Div. 350, 114 Supp. 571, 195 N. Y. 573.

In determining the value it is proper to show the condition of the property and its surroundings, the uses to which it has been applied and its capacity for other uses, including that for which it is required; but a witness cannot give an opinion as to its value for any special use unless purchasers can be found who would pay more for it because of its adaptability to such use. *Matter of Simmons* (*Ashokan reservoir, section 7*), 130 App. Div. 356; aff'd, 195 N. Y. 573.

In such proceeding it is not error to exclude evidence of the adaptability of the property for reservoir purposes when that fact is stated in the petition and no issue thereon is taken by the owner. This, because where material allegations of a verified petition in a special proceeding are not denied, they stand proved for the purposes of the ultimate order. *Matter of Simmons* (*Ashokan reservoir, section 6*), 130 App. Div. 350, 114 Supp. 571; aff'd, 195 N. Y. 573.

On the condemnation of lands for the construction of a reservoir to supply the city of New York with water, it is not error to strike out expert testimony as to the value of lands taken, based upon the value in conjunction with other lands included in the reservoir site, upon the value of the reservoir itself, upon the feasibility and cost of conveying the water to the city, and the value of the water itself to the city; for those matters have no bearing upon the market value of the property at the time it was taken. *Matter of Simmons* (*Ashokan reservoir, section 7*), 130 App. Div. 356, 114 Supp. 575; aff'd, 195 N. Y. 573.

Testimony as to what the value of property would have been if a railroad had not been built is inadmissible; but a witness may state that there had been a general appreciation in real estate values in other localities, and that except for the construction of the road the same general course in values would have prevailed in the locality in question. *Shaw v. New York El. R. R. Co.*, 187 N. Y. 186.

The question, "What, in your opinion, will be the effect of the proposed improvements upon the land proposed to be taken in these proceedings upon the adjoining lands?" is not admissible under the statute, which provided that the commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties interested may derive from the construction of the proposed railroad. *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 261.

Where claimant asks damages for injuries to water privileges, buildings, etc., caused by blasting, and an easement only had been taken in the land, evidence was excluded by the commissioners as to the costs of the buildings, etc., claimed to have been injured; *held*, proper. *Matter of*

Thompson, 35 St. Rep. 266, 12 Supp. 182. See also *Matter of Thompson*, 57 Hun, 419, 32 St. Rep. 969, 10 Supp. 705.

The value of a water power which depends upon locality and adaptability to the use made of adjoining property cannot be shown by evidence of the price paid for similar property. *Matter of Thompson*, 127 N. Y. 463, 40 St. Rep. 200, aff'g 24 St. Rep. 433, 5 Supp. 370.

In proceedings to condemn property used as a mill site, evidence as to the amount of business at the mill and the profits derived therefrom is inadmissible. *Matter of Newton*, 45 St. Rep. 18, 19 Supp. 573. In a proceeding to acquire water rights, the solvency of the petitioner is immaterial, and evidence upon that subject inadmissible. *Matter of P. Water-Works*, 44 St. Rep. 925, 17 Supp. 661.

The price agreed to be paid for land seventeen months before it was taken in condemnation proceedings, in the absence of any evidence tending to impeach the good faith of the transaction or show that the property was sacrificed, affords a fair indication of its value at the time the contract was made and should be considered in arriving at its value when taken. *Matter of City of N. Y. (Hamilton place)*, 67 Misc. 191.

In proceedings for the condemnation of real property for a public use, evidence as to the structural value of the buildings thereon, that is, the cost price at the time of condemnation of the different materials composing the several buildings, with a discount for depreciation from use, and the cost of the labor, architect's fees, and other like expenses in erecting them, is not competent for the purpose of determining the compensation which ought to be made to the owner; and the exclusion of such evidence by the commissioners is proper and does not form a ground for setting aside their award. *Matter of Simmons*, 58 Misc. 607, 109 Supp. 1054.

The price paid upon a *bona fide* sale of the same property about the time of the vesting of the title thereto in the city in condemnation proceedings furnishes some, though not conclusive, evidence as to its value; but, in the absence of evidence that it was sacrificed or its sale was forced or that other circumstances exist which would except the case from the general rule, it should be regarded as controlling.

Where buildings are suitable to the land, direct evidence of their structural value is admissible.

But, even if value of the structural value of buildings should be improper, an award ought not to be set aside for the admission of such evidence, unless it appears that it resulted in injustice to one of the parties; and where there is competent evidence to sustain the award, irrespective of the evidence of structural value, it should be confirmed. *Matter of City of N. Y. (Avenue A)*, 66 Misc. 488, 122 Supp. 321.

When structures are well adapted to the character of the land upon

which they are erected, the value of the land is enhanced to the extent of the value of the buildings. In such cases the value of each enters into the total value which must be the measure of the owner's just compensation when his property is condemned for public use.

When buildings have an intrinsic value which must be added to the value of the land in order to ascertain the value of the whole, the owner may prove the value of his land and the value of his buildings separately; and the latter may be established by the cost of reproduction after making proper deductions for wear and tear. The result of adding these two quantities is nothing more nor less than the value of the land as enhanced by the buildings thereon. This is not a conclusive test of market value applicable to all cases, but it is always competent evidence where buildings are well adapted to the land upon which they stand. *Matter of City of N. Y.*, 198 N. Y. 84, rev'g 133 App. Div. 896.

Section 42 of chapter 724 of the Laws of 1905, as amended by chapter 314 of the Laws of 1906, gives a right to damages to any person who, on the date therein specified, had an established business in the counties of Ulster, Albany, or Greene, which may have been directly or indirectly decreased in value by reason of the acquiring of land by the city of New York for an additional water supply.

Such statutes contemplate the determination of all such claims in the original proceedings taken therein to acquire the property affected. When, however, the commissioners of appraisal refuse to take evidence as to such damages in a proceeding to condemn the property, a person entitled thereto under the statute can compel the city authorities, by mandamus, to institute a separate proceeding for the determination of the claim.

Neither the language nor the purpose of the statute indicate that the Legislature intended to confine compensation for injury to business conducted upon lands not condemned, and the statute does not exclude from its benefits lands which are condemned. *People ex rel. Burhans v. City of N. Y.*, 198 N. Y. 439, aff'g 134 App. Div. 75, 118 Supp. 742.

The petition in the proceedings describing only real estate, evidence as to damages as to parties who were still doing business thereon, for loss to personal property not proposed to be taken, or for loss or decrease of business was properly excluded. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036; aff'd, 130 App. Div. 350, 195 N. Y. 573.

In condemnation proceedings damages must be determined *eo instanti* as of the time of the award; but evidence of past results is entitled to consideration in determining the effect of the continuance of the situation. *Matter of Brooklyn Union El. R. R. Co.*, 105 App. Div. 111, 93 Supp. 924.

The admission of evidence of experts as to the value and rental value of an entire block as a basis for fixing the value and rental value of a

separate place therein constitutes error, but is cured when on cross-examination they testify as to the separate values of the various lots constituting the entire parcel; so that it is possible for the trial court to apportion the evidence of aggregate value and apply the proper figures to the parcel in question. *Shaw v. N. Y. El. R. R. Co.*, 187 N. Y. 186, aff'g 110 App. Div. 892.

Although, when the decree of condemnation in a proceeding by a railroad company to acquire the right to continue to affect the premises by acts, which in the absence of such right constituted a nuisance, determines that there was a taking of property, the question as to the fact of taking the property is not before the commissioners appointed by the decree, but simply the question as to the amount to be paid for the property taken; still this requires an investigation as to the condition of the property and the nature of the nuisance maintained by the railroad company, in order to get a basis for pecuniary compensation. *Long Island R. R. Co. v. Garvey*, 159 N. Y. 334, aff'g 11 App. Div. 626.

Where the commissioners, having reserved a motion to strike out evidence establishing the cost of reproducing buildings and having made their awards, thereafter all certify that before so doing they granted the motion to strike out and disregarded the testimony, the evidence must be regarded as having been eliminated before the awards were made. *Matter of City of N. Y. (Croton river dam)*, 129 App. Div. 707, 114 Supp. 75.

The determination of commissioners of appraisal, appointed in a condemnation proceeding, will not be reversed for errors of law, unless it appears that they adopted an erroneous principle in determining the compensation to be awarded.

This rule applied to a case in which the commissioners struck out before the hearing was closed incompetent evidence which had been received under objection and exception, but declined to strike out similar evidence which, on account of the previous objection and exception, had not been objected to, it appearing that the commissioners were not improperly influenced by the admission of such incompetent evidence. *Matter of Grade Crossing Comr's*, 52 App. Div. 122, 64 Supp. 1074; aff'd, 164 N. Y. 575.

An error in the admission of evidence is not cured by the certificate of one of the commissioners that it did not affect the report. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1.

The owner of land sought be condemned for public use is entitled to have it valued for the most valuable available use for which it is then marketable; and it is immaterial whether he may or may not have actually put his land to any such use or allowed it to remain entirely unused. *Co. of Westchester v. Wakefield P. Co.*, 71 Misc. 485.

Upon the hearing before the commissioners a witness was called by the company to prove admissions made by the owner as to the value of his

property. The witness after stating that he was not certain in his own mind as to just what was said was allowed, against the defendants' objection and exceptions, to state "his impression" as to the amount stated. *Matter of N. Y., West Shore & B. R. R. Co.*, 33 Hun, 231.

In a proceeding to condemn land for a public use, the amount of actual rents received is admissible to show the fee value of the property. *Matter of Blackwell's Island Bridge in City of N. Y.*, 118 App. Div. 272, 103 Supp. 441; *dism'd*, 189 N. Y. 512.

In a proceeding to condemn land, it was error for the commissioners to allow expert witnesses on redirect examination to testify in regard to sales of pieces of property about which they had not been interrogated on cross-examination.

In a proceeding to condemn certain vacant lots, evidence that the best use to which they could be put was the erection of three apartment-houses, the cost of which would be \$75,000, and that the rental value would be between \$14,000 and \$15,000 a year, was inadmissible, as containing uncertain and speculative elements. *Matter of Blackwell's Island Bridge in City of N. Y.*, 118 App. Div. 272, 103 Supp. 441; *dism'd*, 189 N. Y. 512.

Where a parcel sought to be acquired through condemnation proceedings is located upon the borders of the thickly settled portion of a city, almost within stone's throw of a railroad station, and with two lines of trolley cars passing by its borders, testimony offered by the owner of said parcel of land to establish its value before and after the taking of the easement therein, by showing the value of various lots or plot subdivisions thereof, is competent, and its exclusion deprives the owner of his statutory right to introduce evidence, and is erroneous. *Co. of Westchester v. Wakefield P. Co.*, 71 Misc. 485.

It is not error to reject evidence of what was paid to other owners, whose estates differ radically from that of defendant. *Matter of Manhat. Ry. Co. v. Stuyvesant*, 126 App. Div. 848.

Where the commissioners excluded evidence offered by one of the owners to show what he had paid for the land, what he had done with it since, and what *bona fide* offers he had had, it was held that the evidence should have been received and considered by the commissioners, with other evidence tending to show whether there had been an appreciation or depreciation of the land in question. *Matter of Dept. of Public Parks*, 53 Hun, 281.

Where a petition contained a statement that it was the intention of the petitioner in good faith to construct and finish a railroad, it was held error to exclude evidence tending to show that the company had no stability nor capital, and had not done any act since its incorporation to show a *bona fide* purpose to construct its railway. *In re Met. Trans. Co.*, 1 Supp. 114.

An appraisal of damages for injuries to land, made by commissioners who were authorized to view the premises, will not be disturbed for mere errors in the admission of evidence, unless it appears that the commissioners adopted a wrong principle in reaching their determination. *Matter of Comesky*, 83 App. Div. 137, 81 Supp. 1049; rev'd, 179 N. Y. 393.

Evidence of the profits earned by the proprietors in their business is not competent on the question of damages, as the profits of any particular business depend upon a variety of circumstances not connected with the value of the property used. *City of Syracuse v. Stacey*, 45 App. Div. 249, 61 Supp. 165; aff'd, 169 N. Y. 231; dism'd, 201 U. S. 642.

Evidence held to show that an agreement could not be reached with a landowner, though the agent negotiating misunderstood the exact location of the land desired. *N. Y. C. & H. R. R. Co. v. Yonkers*, 103 Supp. 252.

The admission of evidence on the question of damages, of prices paid for adjacent property, is not grounds sufficient for reversal, where it is the best evidence to be had. *Langdon v. Mayor*, 133 N. Y. 628, 45 St. Rep. 191, 4 Silvernail, 271.

In *Trustees of College Point v. Dennett*, 5 Thomps. & C. 217, it is held that upon an appraisal of a pond under statute for supplying water, etc., that the owner was entitled to show, upon the question of value, that there was not a pond within a radius of six miles that could be made a source of supply for cities and villages. The measure of damages was not limited to its use as a mill or ice pond, but the owner was entitled to receive its value for any use.

An exception taken by the owner of one parcel of lands condemned to the exclusion of evidence as to value is not available to the owner of another parcel who did not call the witness, although the testimony related to the price paid for his lands.

And, in any event, a party may not establish the value of his lands by showing what was paid for another parcel similarly situated.

The owner of the lands cannot establish their value by testimony that he received certain offers for the property. *Matter of City of N. Y. (Croton park)*, 142 App. Div. 665.

Subd. 3. General Rules as to Allowance of Damages.

The rule of damages in suits in equity and in proceedings to condemn lands by eminent domain is the same. *Matter of Bd. of Rapid Trans. R. R. Comr's*, 128 App. Div. 103; modif'd, 197 N. Y. 81.

In determining the compensation to be made for taking part of a farm for railroad purposes the benefits occasioned it by the use which the public may make of the road cannot be taken into account; neither can the benefit which may be occasioned the farm by the fact that its owner can conveniently ride and transport the property on the proposed road be considered. *Lewis & Youngstown F. R. Co. v. Ayer*, 27 App. Div. 571.

The condemnation of private property for public use is not intended to benefit the landowner, nor must the condemning party pay for advantages which may accrue to it by reason of the location of its property. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036.

Whether a supposed enhancement of value by reason of a single ownership of several parcels and consequent control of their subdivision or plottage is an element of value depends upon circumstances, and is to be determined by the commissioners. *City of N. Y.*, 56 Misc. 306.

Loss of business profits and good-will are not substantial grounds for damages, nor are they to be considered in estimating the injury caused by the taking of land. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Canandaigua & N. F. Co. v. Payne*, 16 Barb. 273; *N. Y., W. S. & B. R. R. Co. v. Cosack*, 35 Hun, 633.

The commissioners should take into consideration whether damages resulted to the residue of the property of an owner from the use of that actually taken, and if damages did so result they should be included in the award. *Matter of Bd. of Pub. Imp.*, 99 App. Div. 576, 91 Supp. 161.

Where an absolute title in fee is taken in proceedings instituted by a municipal corporation for its condemnation for park purposes, the owner is entitled to an award for the injury which will be done to other and abutting land owned by him, which is drained by a system of drains having their outlet through a trunk sewer in the land sought to be taken, because the right to maintain such outlet for the drains is taken away. *Matter of City of Rochester*, 24 App. Div. 383, *sub nom. Baker v. City of Rochester*, 48 Supp. 764, 82 St. Rep. 764.

On condemnation an owner is entitled not only to the value of the property taken, but also to compensation for damages to the residue caused by the use to be made of the property condemned. *Duncan v. Nassau Elec. R. R. Co.*, 127 App. Div. 252.

Where the proposed use of property taken would depreciate the value of that which is not taken, such proposed use can be regarded and the depreciation arising therefrom be awarded as part of the consequential damages. *People v. Muh*, 100 Supp. 62.

Commissioners have no power to make an award for the loss of an established business or for the difference in value between the machinery as in use and occupation upon the premises and such machinery if moved to another manufactory. *Matter of Dept. of Public Parks*, 53 Hun, 281.

Semble, that the Condemnation Law does not authorize commissioners for ascertaining compensation to include in their award damages for a prior trespass. *Wait v. Hudson Valley Ry. Co.*, 43 Misc. 304.

Under the constitutional provision (art. 1, § 6) “ . . . nor shall

private property be taken for public use without just compensation," a landowner is entitled to receive the fair and reasonable market value of his property at the time of its appropriation, for its best available uses to him and for all the purposes for which it is or reasonably may be used. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036.

Where property is taken by eminent domain the spirit of the Constitution requires that the owner shall be paid not only the value of the property, but all necessary expenses incurred by him in fixing that value.

It will not be presumed that the Legislature intended to deprive the owner of property taken by eminent domain of full protection in his constitutional rights. *Matter of City of N. Y.*, 125 App. Div. 219, 109 Supp. 652; *aff'd*, 192 N. Y. 569.

In *City of Syracuse v. Stacey*, 45 App. Div. 249; *aff'd*, 169 N. Y. 231, it was held that it is well settled that in order to ascertain the value of property taken for public use the owner is entitled to have such property considered with reference to its adaptability for any and all uses to which it may be devoted. Citing *Boon Co. v. Patterson*, 98 U. S. 403; *Matter of N. Y., L. & W. R. R. Co.*, 27 Hun, 116; *Matter of Gilroy*, 85 Hun, 424.

In showing the market value and consequent impairment of property by the taking of an easement, the owner is at liberty to show the particular suitability of his property to any given business. *Matter of Union El. R. R. Co. of Brooklyn*, 55 Hun, 163, 7 Supp. 853.

In proceedings to condemn land for a public improvement the owner may show the value of the land for any purpose for which it may be used, although he may have put it to a different use. *Matter of Gilroy*, 26 App. Div. 314, 49 Supp. 798, 83 St. Rep. 798.

Compensation must be determined by the commissioners upon consideration of the location of the property, the improvements made thereon, and its present and prospective earning capacity, in view of the use to which it may be put. *Matter of Mayor*, 74 App. Div. 343, 77 Supp. 566; *appeal dismissed*, 172 N. Y. 653.

Where a claim was made that an award should have been made for the destruction of a milk business, it was held not well taken; that the commissioners only had the right to consider the value of the land and the improvements thereon, and that the fact that the property had been devoted to a special purpose, which to the owner made it peculiarly valuable, did not authorize an allowance of compensation to be made upon that basis. *Matter of Dept. of Public Parks*, 53 Hun, 281.

When land is taken by eminent domain the owner is entitled to receive the full value, not the value to the owner or to the condemnor, but the market value of the property, which is its fair value as between one who wants to purchase and one who wants to sell it.

While the compensation of the owner should not be based upon the

condition of the property at the time it is taken, or upon the use which he makes of it, he being entitled to receive its market value for any purpose to which it is adapted, yet he is not entitled to be paid an enhanced value merely because the land is peculiarly adapted to the use to which it is to be put. *Matter of Simmons (Ashokan reservoir, section 6)*, 130 App. Div. 350, 114 Supp. 571; aff'd, 195 N. Y. 573.

What is to be ascertained is the value to the owner of the property or property rights to be taken from him and not the benefits direct or consequential to be derived by the petitioner from the use of such property or rights. In arriving at any estimate of the value to the owner the commissioners are required to take into account the availability and adaptability in the hands of the owner of the property taken for particular uses and purposes. *Matter of E. River Gas Co.*, 119 App. Div. 350, 104 Supp. 239; aff'd, 190 N. Y. 528.

In *Matter of Simmons*, 58 Misc. 581, a condemnation proceeding arising for lands for the Ashokan reservoir site for the purpose of securing an additional water supply for the city of New York, and in a proceeding under the same title and for the same purpose (58 Misc. 607), appeals from which were taken and opinions in which appear 130 App. Div. 350 and 130 App. Div. 357, the rules with regard to measure of damages in condemnation proceedings and method of proof are very fully considered.

Where a lane, over which a right of way exists by grant in favor of abutting owners, is taken in condemnation proceedings for a city street, the abutting owners are not entitled to compensation for loss of the easements of light, air, and access, as the street when opened will afford all that the easements represent, and if the street should be closed compensation for the loss of the easements will be made.

An easement in favor of non-abutting owners becomes extinguished with no right to compensation, if, through the closing of the street, access over the bed of the lane be afterward denied them, and they must be compensated for the taking of their easement. *Matter of Pinehurst Ave.*, 67 Misc. 510.

In a proceeding to appraise damages for the change of grade of a street in a village, under section 59 of the Village Law, benefits conferred by the paving of the newly-graded street are not properly an offset to the injuries done by the regrading. *Matter of Bradley*, 68 Misc. 514.

While commissioners appointed to ascertain damages in condemnation proceedings are not at liberty to disregard the evidence of the parties showing the value of lands taken, they may act upon personal knowledge acquired by independent inquiry and are unhampered by technical rules of evidence.

Where the lands taken were assessed for taxation at \$1,200, an award of \$7,750 will not be held inadequate, although witnesses produced by the

condemnor valued the lands at over \$9,000. *Matter of Simmons (Ashokan reservoir)*, 132 App. Div. 574, 116 Supp. 952.

Where a portion of a building has been taken, the proper measure of damages is the difference between the value of the building as it stood before and the value of the remaining portion after the improvement has been finished. *Matter of Lexington Ave.*, 44 St. Rep. 532, 17 Supp. 872.

The mere fact that property is mapped out into lots and that streets, so-called, were laid down upon the map, did not require the commissioners to consider this property as consisting of city lots. *Matter of Dept. of Public Parks*, 53 Hun, 281.

In ascertaining the value of property in condemnation proceedings, the true inquiry where only part of the land is taken is, what is the fair marketable value of the whole, what is the fair marketable value of the property not taken. *Matter of N. Y., L. & W. R. R. Co. v. Arnot*, 27 Hun, 151.

This is said to be a proper question to be put in *Matter of Norwood & Montreal R. R. Co.*, 47 Hun, 489.

Where in condemnation proceedings the portion of land left to the owner is without access to any highway, the measure of damages to the owner is the difference in value between the value of the entire property as it was before the taking and the value of the portion left to him, taking into consideration any injury done thereto by isolation from the highway. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036.

The compensation for dock property taken by the city must be ascertained by the same methods adopted in the case of other property taken for a public use, being determined by its location, improvements, and present prospective earning capacity. *Matter of Mayor, etc., of N. Y.*, 74 App. Div. 343, 77 Supp. 566; *dism'd*, 172 N. Y. 653.

Where timber land is taken by the State for forestry purposes under Laws of 1897, chapter 220, the damage of one entitled to the timber thereon, under a contract with the owner, is the value of the timber on the stump, with interest on the same from the time of the appropriation. *Turner v. State*, 67 App. Div. 393, 73 Supp. 372.

The measure of damages for the appropriation by the State of a portion of a farm for public use is the difference between the value of the farm before and after such appropriation. *Lenhart v. State*, 75 App. Div. 162, 77 Supp. 397.

A gas company whose lands have been taken by eminent domain, which has received compensation for a gasholder thereon valued as a "going concern," is not entitled to receive in addition compensation for the expense of constructing a new main from another of its sources of gas supply.

Such company is not entitled to compensation for mains leading from said gasholder, but not taken by the city.

When a gasholder, which has been in existence for many years, is taken by eminent domain, an award therefor cannot be contested upon the ground that the company had no franchise to lay mains connecting with the gasholder. *Matter of City of N. Y. (North river water front)*, 120 App. Div. 849, 105 Supp. 750; modif'd, 190 N. Y. 350; 118 App. Div. 865, 103 Supp. 908; aff'd, 189 N. Y. 508.

Where a railroad company had a prescriptive right to use a structure in the street of specified dimensions, an abutting owner was entitled to the net difference between the effect of a new structure and the old one on her property, less benefits conferred by the latter. *Foster v. N. Y. C. & H. R. R. Co.*, 118 App. Div. 143, 103 Supp. 531.

In ascertaining the value of a lease, it is proper to determine what interest the tenant has, the rent he pays, and obligations he assumes and will assume. *In re Delancy St.*, 120 App. Div. 701, 105 Supp. 779.

Commissioners appointed under chapter 113 of the Laws of 1883, as amended, to assess damages caused to an abutting landowner by a change of grade of a village street, may allow not only damages to the fee but also for diminution in the rental value of the premises from the time of the permanent change of grade, even though apart from the statute there could be no recovery whatever at common law. *Matter of Johns v. Village of Salamanca*, 129 App. Div. 717, 114 Supp. 707.

Where a plot of land, having a store thereon, in which the owners have carried on business as merchants, is taken in condemnation proceedings, the owners, in a proceeding to determine its value, are entitled to show the general character of the business, but not the profits which they realized from it; such profits depend largely upon judgment, forethought, business skill, the use of capital, and the condition of trade, all of which are elements foreign to the value or location of the land itself. *Matter of Gilroy*, 26 App. Div. 314, 49 Supp. 798.

Where land taken for a city street had formerly been a part of a large tract and was subject to an easement in favor of all the owners of land abutting, it should not be considered as an absolute fee in estimating the amount of the award to the owners. *Matter of Edgecomb Rd.*, 36 Misc. 119, 72 Supp. 1073.

Fixtures which have become part of the land are an element of damages. Heavy machinery. *In re Acquiring Certain Property on North River in N. Y.*, 118 App. Div. 865, 103 Supp. 908; aff'd, 189 N. Y. 508.

The market value of the land to be taken at the time of the filing of the commissioners' oath is the amount to be ascertained and awarded, and upon this the landowners are entitled to interest from the date of the filing of such oath. *Matter of Simmons*, 61 Misc. 352.

Where land has been previously dedicated to public use, the measure of damages to land abutting thereon is the depreciation in value caused

by the city acquiring the fee to the street for street purposes. *Matter of City of N. Y.*, 89 App. Div. 490, 85 Supp. 858.

A party to condemnation proceedings instituted to acquire several lots with separate buildings thereon may present his claim for adjoining lots so as to entitle himself to "plottage" value (determined by its availability for larger structures and without regard to any building there may be thereon) and it will be considered as one plot, and the commission will not be bound to pay the value of each building, or he may present his claim for adjoining lots on separate parcels and be entitled to the value of each lot and each building. *Matter of Armory Bld.*, 73 App. Div. 152, 76 Supp. 766, rev'g 35 Misc. 548, 72 Supp. 37.

Where it appears that land taken by eminent domain is within a half mile of New York city and but a short distance from other settled and improved communities; that its greatest value is in its availability for building sites, and that other land on the opposite side of the same street, when sold on foreclosure, brought a larger sum divided into building lots than was offered for the parcel in gross, it is improper for the commissioners to estimate the damages by valuing the land as divided into two parcels of one acre and three acres respectively. The land should be valued as if divided into building lots. *Matter of Simmons*, 141 App. Div. 120.

Where the commissioners have made an award to a telephone company for the destruction of its business within an area to be flooded by a proposed reservoir, it is error to award an additional amount for the value of the lines and equipment used to supply the subscribers within that district, for the equipment has no value except in connection with said business, for the loss of which the claimant has already been compensated. *Matter of Bensel*, 140 App. Div. 806.

An engine placed in a factory for the manufacture of fertilizer by the owner of the real property and used in the process of such manufacture, resting upon a foundation of concrete sunk in the earth and firmly connected with metal bars laid below the foundation, and a derrick set up in the earth by the owner for like use supported by guys anchored to beams buried in the ground, are fixtures; and the owner is entitled to compensation therefor, where the lands are taken by the State for canal purposes by the right of eminent domain. *Phipps v. State of N. Y.*, 69 Misc. 295.

Subd. 4. Right to Allow for Prospective Benefits.

In *South Buffalo Ry. Co. v. Kirkover*, 86 App. Div. 55, the court discusses the award of damages with reference to an allowance or prospective benefit, citing and discussing numerous authorities upon the question, arriving at the conclusion that (p. 65): "The rule applicable to the meas-

ure of damages in a case where a portion of a tract of land is sought to be acquired by condemnation proceedings by a railroad corporation for its purposes, may be stated to be that the owner is entitled to recover the market value of the premises actually taken by such railroad company, and any deductions on account of any actual or supposed benefits resulting to the remaining property by reason of the construction and operation of the proposed railroad may not be considered; but in addition, such landowner is entitled to recover any damages which resulted to the portion of his premises not taken, not only by reason of the taking of the property acquired by the railroad company, but also by reason of the use to which such property was put by the railroad company. In other words, that if the remaining property was damaged by reason of the fact that the portion taken by the railroad company was, in the natural and ordinary course of events, to be used in such manner that it would cause noise, vibration, and smoke, and the deposit of dust and cinders upon the remaining property of such landowner, such elements or conditions should properly be considered by commissioners appointed to determine the compensation which should be paid to such landowner."

On appeal, 176 N. Y. 301, the question was very fully considered in the opinion of Bartlett, J., and conflict of authority upon the point discussed, holding that the tendency of judicial decisions in the Supreme Court has been in favor of the more liberal rule adopted by the court below in the case at bar. It is said in the opinion: "Considering the principle involved, unembarrassed by legal decisions, it is reasonable that where the State, in the exercise of the right of eminent domain, sees fit to take the property of the citizen without his consent, paying therefor such damages as are the result of the taking, the commissioners in the condemnation proceedings should not only be permitted but required to award the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this act of sovereign power."

At page 306 the court in discussing the measure of damages as between the party taking the property in the exercise of the right of eminent domain and the owner of the property, says: "The exercise of the right of eminent domain is allowed upon the theory that while the taking of property may greatly inconvenience the individual owners affected, it is in the interest and to promote the welfare of the general public. This being so, there is no reason why the citizen, whose land is taken *in invitum*, should suffer any financial loss that may be prevented by awarding him proximate and consequential damages. It may well be that in every case there are remote damages that the citizen, under the circumstances, must suffer. It not infrequently happens that some extensive public improvement, as the construction of a great reservoir in the vicinity of a large city like New York, drives families from old homesteads occupied for generations, and

submerges the entire property. It is apparent that in such cases no reasonable and lawful rule of damages can fully compensate the landowners thus dispossessed."

It was held in *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, that "The rule of damages in condemnation proceedings is the full value of the land taken, at the market price, with no deductions for any purpose whatsoever; and, as to the land remaining, if it appears that its value will be depreciated by the proposed use, this depreciation may be awarded as part of the consequential damages suffered."

This rule was followed in *Sutro v. The Manhat. Ry. Co.*, 137 N. Y. 593, where it was said that "It has been settled by the cases of *Newman*, 118 N. Y. 618, and *Bohm*, 129 N. Y. 576, that in estimating damages to property by reason of the construction and operation of the elevated railway, all benefits, general or special, to the rental or fee value of the property resulting from the existence of the railway, are to be considered, and that only such damages which are over and above all such benefits are recoverable."

In *Lewis v. N. Y. & Harlem R. R. Co.*, 162 N. Y. 202 (228), in discussing the facts in that case, that a substantial benefit was conferred which in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. That the basis of assessment was the difference in value of the easements as they then were, and then afterward with the old and before the new viaduct was erected, citing *Newman v. M. E. Ry. Co.*, 118 N. Y. 618 (624); *Bohm v. M. E. Ry. Co.*, 129 N. Y. 591; *Sutro v. M. E. Ry. Co.*, 137 N. Y. 593; *Bischoff v. N. Y. El. R. R. Co.*, 138 N. Y. 257.

The question arose in *Matter of City of N. Y. (North river front)*, 120 App. Div. 849, in an elaborate opinion by Clarke, J.: "When part of a parcel of private lands is taken by eminent domain for dock improvements by the city of New York, the cost of which improvements is to be paid, not by assessment, but by the city at large, the commissioners in estimating the just compensation to be made may take into consideration the special benefit accruing by reason of the improvement to the portion of the parcel not taken."

This decision, handed down July, 1907, was followed December, 1907, at Special Term, in 56 Misc. 306. On the appeal from 120 App. Div. 849, to the Court of Appeals the question was very fully considered in 190 N. Y. 350, in opinion by Cullen, Ch. J., and the distinction pointed out between the taking of property by a municipality or State, where the question of taxation or assessment was involved, and the taking of property for public purposes by the exercise of the power of eminent domain. The opinion at page 356 refers to the language of Judge Andrews in *Genet v. City of Brooklyn*, 99 N. Y. 296, on this subject, where attention

is called to the fact that there are two powers exercised by the Legislature, the power of taxation and the right of eminent domain. That the constitutional requirement that just compensation shall be made for lands taken for public use must be absolutely performed. That the right to compensation is the right of a citizen whose land is taken which the Legislature can neither ignore nor deny, while power of taxation, on the other hand, is vested in the Legislature, and is practically absolute, except as restrained by constitutional limitation. Judge Cullen, in the principal case, distinguishes *Eldridge v. City of Binghamton*, 120 N. Y. 309, the syllabus of which states that "It seems that where land is taken by the State or by one of its political divisions, pursuant to its authority for public use, the benefit may be set-off, not only against the damages to the remainder, but also against the value of the part taken."

In this case, as stated in opinion of Judge Cullen, the condemnation was under the law which directed a deduction of benefits from any awards for lands taken, and that the validity of the statute was challenged, but that the Court of Appeals declined to decide the question, defeating the plaintiff on the ground of the Statute of Limitations. In the course of the discussion Judge Cullen cites the language of Judge Peckham as to the rule of compensation in *Bohm v. Met. El. R. Co.*, 129 N. Y. 576, as follows: "Before entering on a discussion of these matters I think it proper to say that I should hesitate to admit the correctness of the claim made by defendants, that where private property is taken by a mere business corporation, as for a public use under the granted power of eminent domain, the Legislature could provide that such property could be paid for by benefits accruing to the landowner's adjacent property consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street, or other public and municipal purposes; and where the benefits arising to the adjacent lands of the owner whose property is taken may be set off against the value of the land taken. So in the case of property taken by the State for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. *The principle underlying these cases is, however, the right of the municipality or State to tax the owners of the land left in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land.*"

The conclusion arrived at by the court is that in no case should an award be made for less than the value of the property actually taken by condemnation, although it is unwilling to assert that benefits may not be set off against consequential damages to the part of the land not taken.

Where appraisers can only determine the value of land taken for the opening of a street they must award a fair value for the land taken, and

this cannot be diminished by consideration of enhanced value of the remaining land occasioned by the opening of the proposed street. *Matter of 48th St.*, 19 App. Div. 602, 46 Supp. 311.

Where an increase in value of property is traceable directly to the presence of the railroad in the street, no judgment for damages for its construction can be maintained. Evidence held sufficient to sustain a finding that the increase in value of plaintiff's property, both fee and rental, was attributable to other causes. *Schmitz v. Brooklyn Union El. R. Co.*, 111 App. Div. 308, 97 Supp. 791.

The term "public use," as employed in the Condemnation Law (Code Civ. Pro. § 3370), forbidding condemnation commissioners to make "any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use," denotes such use as the landowner, as one of the public, has the right to make of the public improvement in common with other members of the public. *Lewiston & Youngstown F. R. Co.*, 27 App. Div. 571.

Subd. 5. Value of Structures on the Premises.

In *The Village of St. Johnsville v. Smith*, 184 N. Y. 341, the court said: "In holding as we do that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the cost of the improvements nor their value, or the value of their use to the village. The true inquiry is, how much do the improvements placed upon the property enhance the value of the appellant's land?"

This case was cited in *Matter of City of N. Y. (Blackwell's Island Bridge)*, 118 App. Div. 272, where it was held that in regard to a number of parcels the commissioners erroneously allowed testimony as to the structural value of the buildings. That the rule is that a witness may testify as to the market value of a lot of land and the market value of the lot with the buildings standing thereon. Testimony as to how much the market value is increased by the buildings standing; the structural value of the buildings is not competent. In considering the market value of real estate under such circumstances, it would be obvious that what it had cost to put the buildings there would in no way affect the market value as a whole.

In *Matter of City of N. Y. (Town of Carmel)*, 56 Misc. 311 (at 317, 318), the court citing 184 N. Y. 341, 118 App. Div. 272, *supra*, says: "The rule seems to be now very well settled that the measure of damages is neither the cost of the improvements at the time they were erected nor their value, nor the present cost of reproducing them, but is how much

the structures and erections upon the land increased and enhanced its value.”

These cases were followed by *Matter of Simmons* (*Ashokan reservoir*, Section 6), 130 App. Div. 350, where it is said (p. 353), citing 118 App. Div. 272 and 184 N. Y. 341: “It is unnecessary to discuss the question whether the commissioners erred in refusing to permit the owner to show the value of the structures upon the land further than to say that it is the market value of the land with the buildings and other improvements thereon that is the measure of compensation. The buildings put upon the land are simply adjuncts to the freehold. They add to its value and are properly included in an appraisal of it, but it is the value of the land and structures which is to be determined and not the cost of them. For these reasons it has been held that testimony of the structural value of the buildings is not competent in proceedings of this kind.”

When structures are well adapted to the character of the land upon which they are erected the value of the land is enhanced to the extent of the value of the buildings. In such cases the value of each enters into the total value which must be the measure of the owner's just compensation when his property is condemned for public use.

When buildings have an intrinsic value which must be added to the value of the land in order to ascertain the value of the whole the owner may prove the value of his land and the value of his buildings separately, and the latter may be established by the cost of reproduction after making proper deductions for wear and tear. The result of adding these two quantities is nothing more nor less than the value of the land as enhanced by the buildings thereon. This is not a conclusive test of the market value applicable to all cases, but it is always competent evidence where buildings are well adapted to the land upon which they stand. *Matter of City of N. Y. (Blackwell's island bridge)*, 198 N. Y. 84, rev'g 133 App. Div. 896.

The owner of a building who erected it after the passage of chapter 746 of the Laws of 1894, for the condemnation of certain land in the twelfth ward of the city of New York, and before the commissioners had acted thereunder, *held* entitled to compensation therefor, the construction having been done in good faith for the improvement of the property. *Matter of Mayor, etc., of N. Y.*, 54 Supp. 1066.

Where a party moved a house on her lot after commissioners of estimate and assessment were appointed and hearings begun to take part of the lot for the widening of an avenue, but before the city had acquired title to the land, she was entitled to an allowance for damages on account of the building, without regard to the good or bad faith in moving it. *Matter of Baychester Ave. in City of N. Y.*, 120 App. Div. 393, 105 Supp. 241.

Where the statute authorizes the taking of certain pieces of land, or so much thereof as the commissioners may deem advisable, the owner of the land described in the act, who, in the interval between its passage and the final determination of the commissioners as to the land to be taken, has in good faith erected a building thereon, is entitled to recover compensation for such building as of the time when it was decided by the commissioners that the land should be taken. *Matter of Mayor*, 24 App. Div. 7, 49 Supp. 119, 83 St. Rep. 119.

An owner of lands may recover compensation for the taking of buildings erected thereon by him after the commencement of condemnation proceedings, even though the buildings were erected for the purpose of procuring such compensation, since the title to the land remained in him until actually taken by the city. The question of good or bad faith is immaterial. *Matter of City of N. Y. (Briggs avenue)*, 118 App. Div. 224, 102 Supp. 1102.

Where the owner of real property involved in condemnation proceedings brought by the city of New York buys an existing building and places it on such premises for the purpose of securing an increased award, his action is in bad faith, and the property may be regarded as personal property and damages awarded accordingly. *Matter of City of N. Y. (Briggs avenue)*, 196 N. Y. 255, aff'g 132 App. Div. 930.

One who, knowing that lands are to be taken for a street opening, purchases them and erects a building situated partly on the portion to be taken, is not entitled to an award for the building which he subsequently moved to the portions not taken, as when he erected the building there could have been no intention or expectation that it would be a permanent attachment to the realty within the street line. *Matter of City of N. Y. (Hawkstone street)*, 137 App. Div. 630, 122 Supp. 316; aff'd, 199 N. Y. 567.

Subd. 6. Condemnation for Water Supply.

In *Matter of Gilroy*, 85 Hun, 424, a proceeding instituted by the commissioners of public works of the city of New York to acquire real estate for the water supply of that city, it was held that the commissioners in determining the fair market value of the premises must take into consideration the availability of the property for use in connection with the water supply of New York city.

Upon an appraisal of a pond, taken as a source of water supply for a village, held that the owner was entitled to show upon the question of value that there was not a pond within a radius of six miles that could be made a source of supply for cities or villages. The measure of value was not limited to its use as a mill or ice pond, but the owner was entitled to receive its value for any use. *Trustees of College Point v. Dennett*, 5 Thomp. & C. 217.

In *Matter of Brookfield*, 78 App. Div. 520, upon the facts of the case it was held that in determining the value of the bed of a pond sought to be taken by the city of New York for the purpose of its water supply, its value as the foundation of a reservoir for a municipal water supply could not be considered; rev'd, 176 N. Y. 138, which held that the commissioners of appraisal had awarded only nominal damages for the bed of the petitioner's pond, and that he was entitled to a new appraisal awarding him substantial compensation for his right to use the pond for domestic purposes, harvesting ice, etc.

In proceedings by a village to condemn a company's water-works system, constructed under a non-exclusive franchise, and a contract authorizing the village to purchase the property at the expiration of any five-year period, the compensation to be awarded is the market value of the property, including its franchise and the value of any business under existing contracts which might accrue to a purchaser, but not the value to the petitioners or owners. *Matter of Bd. of Water Com'rs of Village of White Plains*, 71 App. Div. 544, 76 Supp. 11; rev'd, 176 N. Y. 239, where it is held that the commissioners should have included the good-will and franchise of the water company at its full value, as provided by statute.

Under the provisions of chapter 490 of the Laws of 1883, the aqueduct commissioners were not confined to an area which would be overflowed by reason of the construction of the dam across the Croton river, but were authorized to include land likely to be overflowed in extraordinary freshets, and also land necessary to protect the water supply from pollution or injury. *Matter of Gilroy*, 32 App. Div. 216, 52 Supp. 990, 86 St. Rep. 990.

In the construction and establishment of water-works a municipality has no right to destroy a private system of water-works without condemnation or compensation. *Boyer v. Village of Little Falls*, 5 App. Div. 1, 38 Supp. 1114.

The availability of property condemned for use in connection with a water supply for a city, but not its value to the city in view of its necessity, may be considered in determining the compensation therefor. *Matter of Daly*, 72 App. Div. 394, 76 Supp. 28; dism'd, 173 N. Y. 640.

The owner is not entitled to more than the fair market value of the lands because of a mere chance or probability that some time in the future it may be used for some purpose to which it is adapted, unless it appears that its actual market value is enhanced by such chance or probability.

Thus, where the lands are taken for the construction of a reservoir in connection with the water supply of the city of New York, it is not error to exclude evidence tending to show that the value of the property had been increased because the city had selected that site, in the absence of evidence that the value of the land had been increased by its adapt-

ability for reservoir purposes prior to the condemnation proceedings. *Matter of Simmons* (*Ashokan reservoir, section 6*), 130 App. Div. 350, 114 Supp. 571; aff'd, 195 N. Y. 573.

Where in condemnation proceedings instituted by the city of Syracuse under chapter 291 of the Laws of 1889, as amended by chapter 314 of the Laws of 1890, which authorized it to condemn and acquire all the water rights of the riparian owners on the outlet of the lake, an award which is made upon the basis of the difference in value of the affected properties with and without the rights condemned, but allows nothing for the value of the right to the water of the lake, or of the right to sell or divert it, is properly made for the reason that the water rights sought to be condemned and acquired did not and could not include such rights. *City of Syracuse v. Stacey*, 169 N. Y. 231, aff'g 45 App. Div. 249, 61 Supp. 165; dism'd, 201 U. S. 642.

In the absence of a direct grant or a grant by implication, to the owners of the right to utilize the water power, the rights to which were acquired by the city, as a waterfall power, though a dam existed, it seems that no award for the power except for the value of it as it was in actual use at the time the city acquired it was proper. *Matter of Daly*, 72 App. Div. 394, 76 Supp. 28; dism'd, 173 N. Y. 640.

In a proceeding to condemn water rights for the city of New York so as to acquire the borders of a stream and lake and prevent pollution by watering cattle, a substantial sum should be awarded for the fee of the lake bed, although the owners were also the owners of the riparian rights of fishing, ice cutting, etc., and water privileges for which a substantial award had been made. *Matter of Monroe*, 131 App. Div. 872, 116 N. Y. Supp. 334; aff'd, 200 N. Y. 511.

Upon the taking of a water front divided from the main parcel of land of the same owner by the railroad of the company instituting the condemnation proceedings, the award should include compensation for loss of access of the water, reserved to the owner in his previous deed of the strip of land occupied by the railroad as its roadway, since this reservation constitutes a substantial right, notwithstanding the provisions of section 32 of the Railroad Law requiring railroads to maintain farm crossings, etc. *N. Y. C. & H. R. R. Co. v. Marshall*, 120 App. Div. 742, 105 Supp. 686.

In proceedings to condemn the franchise of a water company organized under the act of 1873, it was held that the refusal to make an award based upon the exclusive right of the company to furnish water was proper. *Matter of City of Brooklyn*, 143 N. Y. 596, 62 St. Rep. 809, aff'g 73 Hun, 499, 56 St. Rep. 232, 26 Supp. 198. To authorize an award based on the use of land for a particular purpose, it must appear that it was marketable for that purpose or has an intrinsic value. *Daly v. Smith*, 18 App. Div. 194, 45 Supp. 785.

Commissioners cannot make an award for the loss of an established business, nor for machinery as such, nor for a water power separated from the land. *Matter of Dept. of Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

The rule of damages when lands are taken for water supply is also considered under "Evidence" and "Damages" subdivisions 2 and 3 of this article.

Subd. 7. Condemnation for Municipal Purposes.

Under section 12 of the Grade Crossing Act an injury to property by change of grade of a street may be the subject of an award to the owners or persons interested, although the property is not actually taken. *Matter of Grade Crossing Com'rs*, 154 N. Y. 550, 49 N. E. 127, aff'g 17 App. Div. 54, 44 Supp. 844, 78 St. Rep. 844.

Commissioners in proceedings to condemn land for a street have jurisdiction to try the question of easements in favor of abutting property owners. *Matter of Ethel St.*, 3 Misc. 403, 24 Supp. 680.

The commissioners are not authorized to go outside the area of the improvement and award consequential damages to lands not embraced within it. *City of New York*, 56 Misc. 306.

Although nominal damages may be sufficient where a city lays out a street over lands which have been previously offered by the owner to be dedicated to public use, it is not a rule of law that only nominal damages are to be given for the taking of the fee. *Matter of the Terrace*, 39 St. Rep. 270, 15 Supp. 775.

Where a municipal charter providing for street openings gives the common council power to "take and appropriate the land necessary" for street extensions, it will be construed to mean that no greater interest or quantity of title is to be taken than necessary for the purpose intended to be accomplished, for statutes authorizing condemnation of lands are strictly construed.

Hence, when lands already subject to private easements are condemned under said charter for a public street a mere right of way is taken, the fee remaining in abutting owners, and they are entitled to nominal damages only. *People ex rel. Washburn v. Common Council*, 128 App. Div. 44.

When, subsequent to the revocation of a license to make sewer improvements, worked by a conveyance of the lands, the licensee makes further improvements without the consent of the grantee, he does so as a trespasser, and when the lands are subsequently taken by eminent domain for sewer purposes, the owner is entitled to have the enhanced value resulting from the improvements considered on the assessment of his damage. *Matter of Trustees of Village of White Plains*, 124 App. Div. 1, 108 Supp. 596.

An owner of land which is burdened with easements of passage granted to private individuals and not to the public is entitled to special damages when the land is taken for public street. *Matter of Mayor*, 81 App. Div. 215, 80 Supp. 732.

In a proceeding by a city to acquire the fee to land in a street, where there has been no dedication of such land, but the abutting owners have by conveyances created private easements therein, the owners are entitled to substantial damages, measured by the value of the fee subject to such easements. *Matter of 94th Street*, 22 Misc. 32, 49 Supp. 600, 83 St. Rep. 600.

A city on whose behalf a rapid transit railroad is being constructed under a street is liable to an abutting owner owning the bed of the street subject to easement of street use for damages caused by the impairment of the support of his buildings on his abutting land by reason of the proper construction of said railroad; and such owner is entitled to the full value of his property actually taken without deduction for benefits, and also to just compensation for the injury done to the remainder.

An abutting owner who owns no part of the street has a right to the lateral support of the land in the street, and has a right or easement covered by the statute which entitles him to compensation for all the damages inflicted upon his property by interference with the lateral support thereof through the proper construction and operation of an underground railroad. *Matter of Rapid Transit R. R. Com'rs*, 197 N. Y. 81, modif'g 128 App. Div. 103, 112 Supp. 619.

When the property taken is not a fee, but an easement for the support by land under water of a railroad track on land abutting, the commissioners charged with awarding as damages the "fair market value" are justified in allowing twelve cents a square foot for the easement as against thirty cents for the fee. *N. Y. C. & H. R. R. Co. v. Untermeyer*, 133 App. Div. 146, 117 Supp. 443; aff'd, 196 N. Y. 531.

In proceedings to condemn for a public street land which is held by the owner subject to the right of passage of adjoining owners, the award of nominal damages is proper. *Matter of Adams*, 73 Hun, 581, 56 St. Rep. 234, 26 Supp. 422; aff'd, 141 N. Y. 297. Where the fee value of leased premises has been greatly increased by permanent improvements by the lessee in consideration of a reduced rent, it is not error for the commissioners to fix the fee value at a certain sum, and award a portion thereof to the lessee. *Matter of N. Y. & Brooklyn Bridge*, 19 Supp. 953. Where the fee of land which is subject to the right of passage of owners of adjacent lands is taken in proceedings to open a street the owner of such fee is entitled to substantial damages measured by the effect of such taking upon the value of his remaining property. *Matter of 173d St.*, 78 Hun, 487, 60 St. Rep. 758, 29 Supp. 205.

Where land embraced in a road is taken for a street and is devoted to the same use, a nominal award only should be made. *Matter of Dept. of Public Works*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

In a proceeding by a city to condemn the lands embraced in the bed of an existing street a substantial award of damages to the owner of a nominal fee who owns no abutting property, or to abutting owners who have no interest in a fee of the street, is unauthorized. *Matter of City of N. Y. (Decatur street)*, 196 N. Y. 286, rev'g 133 App. Div. 321, 117 Supp. 855.

Although the record on appeal from the judgment confirming the report of commissioners of estimate and assessment in condemnation proceedings does not show an improper application of rules for the determination of the damages, the Appellate Division may refuse to sanction the confirmation. *Matter of City of N. Y. (Titus street)*, 139 App. Div. 238.

Neither an award in excess of what the owner claims, nor one less than that testified to by the city's witnesses, should be allowed to stand. *Matter of City of N. Y. (Avenue A)*, 66 Misc. 488, 122 Supp. 321.

When lands already burdened with private easements are condemned on a street opening, the value to the owner is less than it would be if the lands were unincumbered, and he is only entitled to a nominal award. *Matter of City of N. Y. (Edgewater road)*, 138 App. Div. 203, 122 Supp. 931; aff'd, 199 N. Y. 560.

Damages in condemnation proceedings are to be awarded as of the date when the award is made. *Matter of City of N. Y. (Titus street)*, 139 App. Div. 238.

The revocation of a license granted by a city to lay gas mains in the streets leaves no basis for an award of damages on account of such mains where the land in connection with which they are used is taken for a public improvement. *City of N. Y. (Fifteenth and Eighteenth streets)*, 56 Misc. 306.

The right to remove trade fixtures is given absolutely to a tenant and he has a reasonable time to remove them after the expiration of his term; but the right to remove fixtures which are distinctly realty is in the nature of a license and must be exercised while the tenant is in possession under the lease that grants it.

Upon the taking of a building containing trade fixtures they are to be regarded as real property for the purpose of making compensation and the tenant is under no obligation to remove them where his term has not expired, but the compensation therefor belongs to the tenant.

The amount of such compensation for trade fixtures should not be deducted from the amount previously determined to be just compensation to the owner of the land when the latter amount did not include the value of such trade fixtures. *Matter of City of N. Y. (Avenue A)*, 66 Misc. 488.

Mandamus will lie to compel the appointment of commissioners to determine compensation where a street is narrowed, though the strip taken is narrow, and the damage small. *People v. Delaney*, 120 App. Div. 801, 105 Supp. 746; modif'd 192 N. Y. 533.

Where a city and private owner acquired their property by purchase with reference to a map showing streets and the property appeared to be laid out on a certain street, *held*, that so long as the street remains open in front of the blocks upon which the private owner's property abuts, and it does not appear that the erection of a building on the portion of the street sought to be vacated will interfere with light and air, he is not deprived of any private easement. *Reis v. New York*, 188 N. Y. 58, aff'g 113 App. Div. 464.

The owner of property abutting on a public street is not bound by the description of his property set forth in a petition for condemnation for the use of an elevated railroad; it being conceded that he is an abutting owner he may rely upon the presumption that he owned to the center of the street. *Murphy v. Interurban St. R. R. Co.*, 105 App. Div. 111.

Subd. 8. Condemnation for Railroad Purposes.

The principles upon which compensation is to be made to the owner of lands taken under the General Railroad Law have been frequently considered by the courts of this State, and the rule is now established that such owner is to receive as compensation, first, the full value of the land taken, and second, where a part only of land is taken a fair and adequate compensation for all injury to the residue, sustained and to be sustained by the construction and operation of the railroad. The first element in the award is compensation for land which the railroad takes, and to which it acquires title, and second, damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are generally consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom. *Newman v. El. R. R. Co.*, 118 N. Y. 618, citing numerous authorities, including *Lewis on Eminent Domain*, § 471. While this case was decided under the provisions of the General Railroad Act, a comparison of its provisions, as quoted in the opinion, with the provisions of section 3370 will show that they are in this respect substantially similar.

It is said, *Bohm v. El. R. R. Co.*, 129 N. Y. 585, that generally, in taking property in condemnation proceedings, the rule may be said to be the value of the land taken at its market price, and no deduction can be made from that value for any purpose whatever; that as to the remaining land, the question is: Whether the company should pay for the injury

caused by the taking of the other property? or, whether, in case the proposed use of the property taken would depreciate the value of that which was not taken? or, whether such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages separate from the taking? The court held the latter to be the true rule.

In *Papenheim v. Met. El. R. R. Co.*, 128 N. Y. 436, it is said that it seems that the measure of damages can be the difference between the fair market value of the property at the time of condemnation without the structure, and the present market value of the property with the structure in existence.

Again, in *Odell v. N. Y. El. R. R. Co.*, 130 N. Y. 690, 42 St. Rep. 591, it is held that the full market value must be paid without deduction for benefits, considering the question as to damages to lands not taken, and of the property rights of abutting owners, and advantages and disadvantages, benefits and injuries of the road must be considered, and if the benefits equal or exceed the injuries no damages can be awarded.

The compensation for damages should not be restricted to the actual value of the land taken, nor to the depreciation of the value caused by the separation of the piece from the whole, but to the difference in value of the property before and after the improvement. *Mills on Eminent Domain*, § 159, citing numerous authorities. Where the owner's whole tract is taken, its market value at the time of taking is the measure of compensation; where only a part of the lot is taken, it must be treated not as a separate and independent piece, but in its relation to the part not taken. The general rule of damages which covers the part taken, and the injury to the remaining land, is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking. It seems, in proceedings by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is, first, the full value of the land taken; second, a fair and adequate compensation for all the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to ascertain the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. *Henderson v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 423. In making appraisals of the damages sustained by a person whose property is taken for the purpose of a railroad, the true rule is to determine what will be the effect of the proposed change on the market value of the property remaining. The proper inquiry is, What is the entire property now fairly worth in the market, and what will that part not taken be worth when the improvement is made? *The Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169.

The intention of the Legislature was to confine the commissioners to an estimate of the price to be paid by the railroad company to the owner of the land proposed to be taken, regardless of the benefits which might result to him as the owner of adjoining land in consequence of the contemplated improvement. It is a proper rule for the commissioners to adopt that they will allow full compensation for the land taken, including therein the damages to the adjacent land by reason of such taking, and that they will not allow consequent and prospective damages. They are to consider how the taking, not how the use, of the land will affect the residue of the owner's land, and award damages accordingly. *Albany & Northern R. R. Co. v. Lansing*, 16 Barb. 68. The office of the commissioners is to determine the compensation to be awarded to the owner of the real estate proposed to be taken; they are to decide questions of present value, and not to speculate in respect to the probable consequences of constructing and operating a railroad. *The Canandaigua & N. F. R. R. Co. v. Payne*, 16 Barb. 273. The proper inquiry is, What is the fair marketable value of the whole property, and what will be the fair marketable value of the property not taken? The difference will be the true amount of the compensation to be awarded. *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104.

When land is taken for the construction of a railroad without the consent of the owner, the compensation therefor is not limited to the depreciation of the residue of the lot from which it is taken by such separation, but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated; where only part of a lot is taken, the question is, What will the whole bring in the market after the railroad is constructed, and everything which will depreciate the value of that residue is to be taken into account. The damages to be paid are to be determined by the detriment occasioned to the owner of the land taken, and the amount thereof should be neither increased nor diminished by the fact that the land to be taken was peculiarly well situated or adapted to the uses of a railroad. *Matter of The Boston, H. T., etc., R. R. Co.*, 22 Hun, 176. If it is more exposed to fire, if access is more difficult, if its use is more inconvenient, if its value is depreciated by smoke, noise, or increased danger, these are all to be considered. The question is, What is the market value of the whole without the railroad; what is the market value of the remainder with the railroad? *Matter of Utica, etc., R. R. Co.*, 56 Barb. 457. See, also, *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb. 80. The same rule is also held in 1 Thomps. & C. 549, *supra*, as to the consideration of damages to remaining land by that taken for railroad purposes, but is contrary to the rule in *Albany & Northern R. R. Co.*, 16 Barb. 68; *Troy & B. R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Canandaigua & Niagara Falls R. R. Co. v. Payne*, 16 Barb. 273; *Black River & M. R. R. Co. v. Barnard*,

9 Hun, 104; *Matter of Prospect Park & C. I. R. R. Co.*, 13 Hun, 345; *Matter of Union Village, etc., R. R. Co.*, 53 Barb. 457; *Matter of N. Y. El. R. R. Co.*, 36 Hun, 427. But see also, as sustaining 56 Barb. 456, *supra*, *Matter of N. Y. C. & H. R. R. Co.*, 15 Hun, 63. The rule upon which commissioners should determine the compensation which ought justly to be made by the company to the owner is well settled by authority. The owner should be awarded the market price of the land already taken, and, in addition thereto, the depreciation in the market value of the lands remaining as compared with their former market value. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 609; *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 262.

In estimating the damages to which a lessee of premises, part of which he uses for drying goods manufactured in the rest, is entitled for the taking of his drying-ground for railroad purposes, the commissioners should consider the injury to the property as a whole, the difference in the value of the leasehold interest before and after the land is taken; but the willingness of the lessor to lease another piece of land, suitable for drying purposes, is not admissible. *N. Y., West Shore & B. Ry. Co. v. Bell*, 28 Hun, 426. Where valuable property was rendered difficult of access from the river by taking of lands and construction of railroad, it was held, it seems, that the proper measure of damages would be the expense of restoring communication with the river, destroyed by the construction of the road. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646. It is competent to show how much other land of the same owner is injured by the use of that taken, and he may give evidence of the value of the land for any purpose for which it is adapted. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 602. See this case as to rule of damages where part of stock farm was taken holding that measure of damages would be what it would cost to construct another track. The opinions or conjectures of witnesses as to the effect the use of the railroad will produce in frightening horses on a turnpike, or as to the necessity of deviating the line of a turnpike at another place, or the cost of diversion, or that a bridge ought to be built by a railroad company at a crossing, or as to the amount of damages the turnpike company will sustain by reason of the crossing of its road, are said to be inadmissible. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100. Although the measure of damages for lands condemned for railroad purposes is not in any case the value which they will have in the hands of the corporation acquiring them for such purposes, yet where the lands have been improved, and where they have, in the hands of the owner, a special value for railroad purposes, and a franchise for their use for such purposes has been granted by the Legislature, and they are held by the owner for such use, or for sale for such use, the market value of the land for the use of which it is especially adapted becomes the

measure of damages and it is proper for the commissioners to receive and consider evidence of all improvements, the location of the track, and the value of the franchise. Technical errors committed by commissioners in the admission of evidence of value or damages will not affect the appraisal, where the court cannot see that the commissioners have erred in the principles which ought to govern such appraisal. An appraisal will not be set aside as excessive unless the excess is plain and palpable on the evidence. *Matter of Lackananna & Western R. R. Co.*, 27 Hun, 116. It is said, in *Boom v. Patterson*, 98 U. S. 408, that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future. It is said, *Matter of N. Y. C. & H. R. R. Co.*, 6 Hun, 154, that it is proper for the owner to show before the commissioners the purpose for which lots had been purchased by him, and for which they were intended to be used. See, also, *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298.

It is said, in *Furniss v. H. R. R. Co.*, 5 Sandf. 551, that all damages of every kind, naturally consequent upon the construction of a railroad, are presumptively included in the assessment. The commissioners must appraise the land at its actual value; they cannot make a reservation of easements and privileges to the owner, and when the award stated that it was based on the supposition, and made on the condition and with the understanding that the owners of the land might open a street across the railroad, it was held by the court that the appraisement was illegal, and that the inquisition should be set aside. *Hill v. M. & H. R. R. Co.*, 5 Denio, 206; s. c., 7 N. Y. 152. See, however, *Ex parte Hartford & Conn. R. R. Co.*, 65 How. 133, holding that a company may petition for the appraisement of the surface only of the land required for its road. Where there is a mortgage upon the land taken and the company have erected valuable improvements thereon, *held*, on foreclosure and sale in parcels of the whole of the mortgaged premises, that the railroad company were bound to contribute to the payment of the mortgage debt if the same was not paid by the sale, in the inverse order of alienation of the other property covered by the mortgage, the full value of the piece of land taken and appropriated by them at the time of such appropriation, with interest thereon to the time of payment. *Dows v. Congdon*, 16 How. 571.

In case of a dwelling-house and ten acres of land adjacent, and occupied in connection, separated by a turnpike, the owner of the land was held entitled to have the damages to the whole property estimated, including that on the west side of the turnpike. The land should have been treated as a whole and the damages assessed as a whole. *N. Y., W. S. & B. R. R. Co. v. Lefever*, 27 Hun, 537. Where, however, lands consisting of blocks of land were divided by a railroad already built, it was held no damages

could be recovered for injury to property upon the opposite side of the track from that taken, and the damages were held to be: First, the value of the ground taken; second, the consequential damages, if any, to that portion of the land lying on the same side of the block as that taken. *Matter of N. Y. C. & H. R. R. Co.*, 6 Hun, 149. The rule laid down by Pierce (p. 212) is that a mere formal division into lots, or even division by a highway, does not prevent the different lots being treated as an entirety, where they are still used together and held for a common purpose. The owner cannot ask to have his land treated as several distinct lots for the purpose of increasing the damages, and yet ask that it shall be considered as one tract from which the railroad has taken a part for the purpose of securing damages on the whole. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 151.

It was held, in *Matter of N. Y. Elevated Ry. Cases*, 36 Hun, 427, that the owner is not entitled to compensation for the disturbance caused by the noise and vibration, or the annoyance of ashes, dust, cinders, and smoke incidental to the operation of an elevated railway any more than of a surface railway. As to the rule in such case, with respect to surface railways, the authorities collated, *Pierce on Railroads*, 217, sustain the doctrine that inconveniences from noise, smoke, etc., are not independent grounds of compensation, but when land is taken, may be admitted in estimating depreciation of balance. See the following authorities: *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Gould v. Hudson R. R. Co.*, 6 N. Y. 535; *Bellinger v. N. Y. C. & H. R. R. Co.*, 23 N. Y. 42; *Selden v. D. & H. Canal Co.*, 29 N. Y. 634; *Coster v. Albany, etc., R. R. Co.*, 43 N. Y. 399; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234.

The owner of premises, who is also the owner of the fee in the adjacent street, may recover damages for the construction and operation of a trolley road in the street, not only to the injury to his easements of light, air, and access, but also for that due to the noise and vibration as a result of the operation of the cars on his property in the street. *Am. Bank Note Co. v. N. Y. Elev. R. R. Co.*, 129 N. Y. 252, dist'd.

Where land is acquired by a railroad company without the consent of the owner he is entitled to recover the market value of the premises actually taken and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put by the company. This rule does not include injuries from the improper operation of the railroad, but does include all damages which the proper construction of the railroad entails. *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301; followed, *Rasch v. Nassau Electric R. R. Co.*, 198 N. Y. 385, aff'g 120 App. Div. 897.

The rule of damages is the difference in value between the property as it was before the railroad is constructed, and as it will be after construc-

tion. The rule for an additional taking of land already subject to an easement of a public street for a railroad is only nominal. So held in the case of *Union El. Ry. Co. v. Jewett*, 30 St. Rep. 164, 8 Supp. 813.

Where a railroad company, under municipal authority, erected a bridge over a tract of which plaintiff owned the fee, and constructed pillars in the street as an additional support to the bridge, plaintiff's injury was only to the extent that his right of way had been impaired by the obstructions placed in the street, which should have been proved by evidence of the difference in value of his adjoining land with his street obstructed and unobstructed. *Coatsworth v. Lehigh Valley Ry. Co.*, 115 App. Div. 7, 100 Supp. 504.

The right of interference by a railroad company with an adjoining owner's property, by jarring and shaking his dwelling-house, and causing smoke, dust, ashes, and cinders to enter therein, through the operation of a turntable, is in the nature of an easement; and the effect of a proceeding to acquire such right by condemnation is to take out of the owner's property something of value and transfer it to the company, and justifies an award of substantial compensation, depending upon the condition of the premises, the difference in their value before and after the placing of the turntable, and the effects of its use upon their enjoyment. *Long Island R. R. Co. v. Garvey*, 159 N. Y. 334, aff'g 11 App. Div. 626, 42 Supp. 155.

The measure of damages caused by the running of an electric road across a farm is the difference in the value of the farm before it was crossed and its value after the construction of the road, and in determining its value after the construction of the road it is proper to consider that the house and other farm buildings added largely to the value of the farm as a whole, and that without them the land itself was not worth \$100 an acre, but about \$55; that these buildings were not injured; that the road divided the farm into two equal parts; and that the part beyond the tracks from the buildings was really the only portion of the farm that was seriously damaged. *Buffalo L. R. Ry. Co. v. Phelps*, 52 Misc. 315, 102 Supp. 214.

Where a railroad company condemns and appropriates to its own use lands extending along the right of way of another railroad company upon whose right of way the former company is to lay its tracks, the lands taken being required to support the earthwork necessary to the construction of the tracks upon the right of way of the latter company, the one whose lands are taken is entitled to their full value and to such consequential damages, taking into consideration the advantages and disadvantages of the construction and operation of the railroad, as will result from such use. *Genesee River R. R. Co. v. Boyington*, 60 Misc. 416.

Interference of easements of light, air, and access which were the only rights affected by the running of trains held not to constitute basis of recovery. *Wolf v. Manhat. R. Co.*, 51 Misc. 426, 101 Supp. 493.

Where a stone embankment in a street on which a railroad was constructed was increased in height as authorized by the Laws of 1892 (p. 694, chap. 339), thereby causing damages to plaintiff's premises exceeding her previous damages, such change was a taking of plaintiff's property entitling her to damages. *Wallach v. N. Y. & H. R. Co.*, 111 App. Div. 273, 97 Supp. 717.

Increase in length of trains and change in motive power held not increased user, but increase in size of and injurious changes in structure held greater user. *Bremer v. Manhat. R. Co.*, 191 N. Y. 333.

The running of trains below the surface of a street does not interfere with easements of light and air and access; but the running of them on an elevated structure is a taking of such easements for which compensation is required. *Caldwell v. N. Y. & H. R. Co.*, 111 App. Div. 164, 97 Supp. 588.

Commissioners of estimate and assessment in proceedings by a city to acquire title for a street opening should not arbitrarily and without justification award damages largely below the figure to which the city is committed by the testimony of its witnesses.

Where such proceedings have dragged along for two years and the city's expert being recalled testified that the value of the premises has increased nearly \$2,000 since he first testified two years before, and the other evidence shows a greater value than he places on the land, a report which awards damages in the sum to which the expert first testified should not be confirmed. This, although it appears that the commissioners viewed the premises early in the proceedings. *Matter of City of N. Y. (Titus street)*, 139 App. Div. 238.

In no case should commissioners make an award for less than the value of the property actually taken on condemnation, nor should they deduct the value of benefits to portions retained by the owner. *Matter of Com'r of Public Works*, 135 App. Div. 561, 120 Supp. 930; aff'd, 199 N. Y. 531.

An owner of land taken by a city under legislative authority is entitled to a substantial award although other parties have easements in the land.

An award is not substantial where the difference between the value given by the witnesses and the award indicates that the commissioners must have mistakenly considered the land subject not only to private but also to public easements.

Where a city destroys buildings erected on land, with the consent of owners of private easements therein, once shown on a map as a street but which has ceased to be such because it was neither opened nor worked as such within six years from the filing of the map, the city must make the owner of the buildings a substantial award. *Matter of Summit Ave.*, 35 Misc. 59, 71 Supp. 207, modif'g 84 App. Div. 455.

Where fee is taken under authority of the Legislature, the owner is entitled to substantial damages, though other parties have easements in such land. *Matter of Opening Trinity Ave.*, 35 Misc. Rep. 56, 71 Supp. 24; rev'd, 81 App. Div. 215, 80 Supp. 732.

The making of a report by the commissioners does not divest the title of the owners, and where they convey before the report is confirmed, the award is to be distributed as realty. *City of Brooklyn v. Seaman*, 30 Misc. 507, 62 Supp. 601.

ARTICLE IX.

THE AWARD. § 3378.

Subd. 1. General provisions as to award, 562.

Subd. 2. How award apportioned among claimants, 563.

§ 3378. *Conflicting claimants*, 563.

Subd. 1. General Provisions as to the Award.

Where different parties are interested in different parcels, a single award for the whole is improper. *Matter of Daly*, 23 App. Div. 232.

Although the majority of the commissioners must sign the report, they need not all be together at the signing, as it involves no deliberation or judicial action. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168. The testimony taken on the hearing and annexed to the report is to be considered a part thereof. *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298. Errors occurring in the report of testimony taken before the commissioners appointed to assess damages under the General Railroad Act are subject to correction by such commissioners, as a proper judicial function, and within their province only. *N. Y., W. S., etc., R. R. Co. v. Judson*, 33 Hun, 293. In case commissioners to assess damages to lands taken for highway purposes have filed their report, their power of amendments is gone, and a subsequent report has no validity. *People ex rel. Mann v. Mott*, 60 N. Y. 649. Upon application and order of the court, the commissioners may amend or correct their report so as to conform it to the state of facts as they exist. They have no right, however, at the time of such correction, to hear proof by claimants as to damages. After having viewed the premises, and decided upon the amount of damages to be paid, their powers, under the appointment, are exhausted, so far as the amount of damages are concerned, without further order of the court. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177. Where there has been a succession of appraisals in the same county, one report may embrace all the different parcels. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238.

An assessment of fee damages must be of the date of the award, and where the report of the commissioners found the damages as existing at a date nearly a year prior to the award the court refused to confirm the report. *Matter of Manhat. R. Co. v. Comstock*, 35 Misc. 326, 71 Supp. 941; aff'd, 74 App. Div. 341.

The commissioners need not state what additional value they give to land by reason of bulkhead rights adjacent thereto belonging to the same owner, where they report that they took such rights into consideration and that they increased the value of the land taken. *City of N. Y.*, 56 Misc. 306.

The market value of the land to be taken at the time of the filing of the commissioners' oath is the amount to be ascertained and awarded, and upon this the landowners are entitled to interest from the date of the filing of such oath. *Matter of Simmons*, 61 Misc. 352.

The Legislature did not intend that when the entire property is to be acquired by eminent domain it shall be necessary to set out every easement, franchise, and incidental right, and the award for the entire property must answer for the compensation of subsidiary rights and interests. *Seton v. City of N. Y.*, 130 App. Div. 148, 114 Supp. 565, rev'g 61 Misc. 430, 114 Supp. 1145.

Where there is a dispute as to the ownership of a parcel condemned the commissioners should ascertain and report its value, making the award to unknown owners, as they cannot determine a question of title. The award, when confirmed, becomes conclusive upon all parties, who must then try the question of title in appropriate proceedings brought for that purpose. *Matter of Com'r of Public Works*, 135 App. Div. 561, 120 Supp. 930; aff'd, 199 N. Y. 531.

Subd. 2. How Award Apportioned Among Claimants. § 3378.

§ 3378. Conflicting claimants.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

The provisions of section 3378 are not in violation of the Constitution. The money directed to be paid may be deposited in bank under the order of the court, and when so deposited, it takes the place of the land as to the owner, and is the property of the parties entitled to compensation. There may be conflicting claimants to the fund, and the intervention of the court may be necessary for its distribution, or for the adjustment of liens. The fund is subject to the same liens to which the land was, before being taken. It does not affect the validity of an order, whether it directs the money to be drawn out on *ex parte* application, or on notice. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116.

Where the commissioners are in doubt as to the title of a lot, their award may be made to unknown owners. *Matter of Armory Board*, 35 Misc. 548, 72 Supp. 37; rev'd, 73 App. Div. 152.

Semble, that damages, awarded by a final order entered under the Condemnation Law to a testatrix before her death for injuries done by an

elevated railroad to her real property abutting on a street but paid after her death, belong to her residuary estate and not to her devisee of the property. *Matter of Lyle*, 41 Misc. 596.

Where property is taken under condemnation proceedings, the devisee of the property under the will of the owner is not entitled to the award, as the proceeds of the proceeding become personal property. *Ametrano v. Downs*, 170 N. Y. 388, aff'g 62 App. Div. 405, 70 Supp. 833.

Where city acquires title to land for street purposes, the right to the award vests in the owner, and passes to his estate on his death. *Matter of Reubel*, 52 Misc. 604, 103 Supp. 804.

Where commissioners in condemnation proceedings have awarded a certain sum for additions made to the premises by tenants which, in their opinion, constituted "fixtures which the latter could not remove" the basis of valuation on a settlement between the landlord and the tenants of their respective rights in the fund thus produced should be the same as that under which the sum to be divided was originally produced, and where the commissioners had adopted a measure of present market value, it is erroneous to substitute in place thereof a "value, if any . . . based upon the value of the particular property after it had been detached from the building at the expiration of the demised term . . . with the value of the use of said property for the unexpired term." *Matter of City of N. Y.*, 192 N. Y. 295, modif'g 122 App. Div. 890, 106 Supp. 1117.

Where lands taken by a municipality for a public use are, at the time the title thereto vests in the municipality, owned by A, subject to a life estate of B, in one undivided half thereof, the court has no power to compute the value of B's estate and deduct it from the amount awarded for one undivided half thereof; but the life tenant is entitled to the accrued interest upon one-half of the award at the time of payment and to the use of one-half of the award during his natural life, although he will be required to give adequate security before receiving the principal. *Matter of Gilroy*, 60 Misc. 125.

The right to an award to an abutting owner in proceedings for the widening of a street will not pass under a deed, subsequent to the vesting of the title of the property taken in the city, which conveys the remainder of the property with the interest of the grantor in the adjacent street. *Harris v. Kingston Realty Co.*, 116 App. Div. 704, 101 Supp. 1104.

The right to an award for lands taken by a city in street opening proceedings, held to vest in the owner at the time the title of the land vested in the city, and not to pass to a subsequent grantee of the adjacent premises, where the deed did not in terms carry the right to such award. *Matter of Mayor (Trinity avenue)*, 116 App. Div. 252, 101 Supp. 613.

As the use of a street by a city for an elevated bridge approach is legal, the compensation for taking the fee should be paid to the one who owned

the same when the structure was built and not to his grantee who subsequently took title while the proceeding was pending.

Under such circumstances it is presumed that the price paid by the grantee was based on the value of the land in its damaged condition. *Matter of City of N. Y. (Newtown creek bridge)*, 128 App. Div. 150, 112 Supp. 531; aff'd, 195 N. Y. 527.

On condemnation proceedings against land held by life tenants with remainder over to the children of one of them, *held*, error to adjudge the ownership of the principal of the award to the child of such life tenant as representing the remainder, since other children may be born, but that the money should be paid into court under section 3378. *Pecksport Con. Ry. Co. v. West*, 47 Supp. 230, modif'g and aff'g 45 Supp. 644.

The inchoate right of dower of a wife must be recognized and protected in all proceedings against her husband. *Matter of N. Y. & B. B. Co.*, 75 Hun, 558, 59 St. Rep. 613, 27 Supp. 597; aff'd, 60 St. Rep. 874.

But, however, where an award for land taken to lay out a highway was made to the plaintiff's husband instead of the plaintiff, the actual owner it was held not to invalidate the proceedings, in *Mitchell v. Village of White Plains*, 62 Hun, 231, 41 St. Rep. 787, 16 Supp. 828.

Where, in pursuance of an act of the Legislature, lands are taken by a municipal corporation for a public use, upon an appraisalment and payment of their value to the holder of the fee, the corporation acquires an absolute right to them, divested of any inchoate right of dower existing in the wife. *Moore v. The Mayor of N. Y.*, 8 N. Y. 110. The commissioners should determine the compensation to be made to a widow who has dower or life estate in lands taken (*Matter of William Street*, 19 Wend. 678), and also the compensation to be made to the mortgagee. *Matter of John Street*, 16 Wend. 659. Where land is condemned for railroad purposes, a claim to a portion of the sum awarded as compensation made by the county for unpaid taxes upon the property cannot be maintained on any ground which would be insufficient in a direct proceeding by virtue of the assessment to support a sale of the property or uphold a tax title. *Matter of N. Y. C. & H. R. R. Co.*, 90 N. Y. 342, modif'g 15 Wkly. Dig. 137. Change of ownership, pending proceedings, shall not affect the award, but it is to be made and perfected as if no conveyance had been made. L. 1854, chap. 282, § 6. Where a tenant is in possession, the criterion of his damages is the amount by which the rental value of the land exceeds the rent reserved. *Matter of City of Buffalo*, 1 Sheld. 408.

Where tenants and subtenants of property taken in condemnation proceedings are entitled to an award, such award must be deducted from the value of the fee.

Where, in such a case, the lease and sublease each contains a privilege of renewal, and it appears that the condemnation proceedings were commenced during the original terms thereof, that the lessee and sublessee were parties to the proceedings, and that at the time the report was made the original terms had expired and it does not appear that the lessee and sublessee ever exercised the privilege accorded to them by the lease and sublease to demand a renewal, an award of \$1 each to the lessee and sublessee will be sustained. *Matter of Pier 39*, 62 App. Div. 271, 70 Supp. 1127; aff'd, 168 N. Y. 254.

Where wharf property is rented subject to the contingency that the city may, by legal proceedings, take possession of the same, the tenants are not entitled to have the value of their unexpired term ascertained and deducted from the award made to the landlord for the value of the property taken. *Matter of City of N. Y.*, 168 N. Y. 254, aff'g 62 App. Div. 271.

Where the land is leased the commissioners either appraise the entire value and then apportion it among the fee owners or tenants or in the first instance appraise the value of each separate interest. *Matter of Trustees*, 137 N. Y. 95.

In appraising the value of and apportioning the respective interests of owner and lessee of land taken in condemnation proceedings, after ascertaining the fair market value of the property as a whole, the actual value of the leasehold is to be determined and awarded to the lessee, and the residue to the owner. *Matter of City of N. Y. (Delancey street)*, 120 App. Div. 700, 105 Supp. 779.

Where the city of New York had condemned a wharf and bulkhead, on which a railroad company, as lessee of the owners, maintained certain structures connected by tracks with other structures situated on the opposite side of an intervening street, on land leased from the same owners, all the structures, with the tracks and fixtures, being used together, as one plant, for a passenger and freight station, the lessee may surrender and release to its lessors its lease and all claims which, as tenant, it has against the city for the condemnation of the wharf and bulkhead; but at the same time and in the same instrument reserve any claim it has for injury to or destruction of its structures and fixtures resulting from the diminished value thereof caused by the severance of the property condemned by the city. *Matter of City of N. Y.*, 193 N. Y. 117, rev'g 125 App. Div. 393.

In apportioning between the landlord and tenant an award for property taken in condemnation proceedings by the city of New York, the tenant is only entitled to the value of his lease and to the value of the right to remove trade fixtures at the expiration thereof, and the latter item only includes the value of the property he has a right to remove after it is severed from the real estate, and not its value based upon what it would

cost to install it with a depreciation of its use during the time it has been in use. *Matter of City of N. Y.*, 101 App. Div. 527, 92 Supp. 8; aff'd, 182 N. Y. 281.

A landlord and tenant may agree to an apportionment of damages, for property taken in condemnation proceedings, which either of them might claim if he were the owner of the entire estate. *Matter of City of N. Y.*, 193 N. Y. 117, rev'g 125 App. Div. 393.

The lessee's interest is to be determined by ascertaining just what interest he had in the lease as a whole, considering the rent he pays, the obligations that he has and will assume under his lease, and just what that interest is worth and what its market value is. *Matter of City of N. Y. (Delancey street)*, 120 App. Div. 700, 105 Supp. 779.

A cemetery association was incorporated under the Laws of 1847 (as amended by L. 1853, chap. 122), directing the application of half the proceeds of lots sold to the payment of the purchase price. Certain land was conveyed to the association under an agreement reciting the fact of the incorporation under such statute, and specifying the fractional part of the whole tract of which each grantor was owner, and that the grantors were to be paid by receiving half the proceeds of lots sold from the tract. A portion of the lands was condemned for street purposes; *held*, that the grantors were entitled to one-half of the proceeds of the condemnation. *Whittemore v. Woodlawn Cemetery*, 71 App. Div. 257, 75 Supp. 847.

The rule is well established that where a mortgage has been given upon property prior to the taking of a portion thereof by the city, if upon a foreclosure and sale after such taking a deficiency remains, the lien of the mortgage extends to so much of the damages awarded as may be needed to make good the deficiency. *Matter of Mayor (Morris avenue)*, 118 App. Div. 117, 103 Supp. 180.

An award is properly made to one who was owner of the equity of redemption at the time the city took title, as title does not pass to a purchaser under a subsequent foreclosure. *Matter of City of N. Y.*, 30 Misc. 295, 62 Supp. 379.

Where title to premises had vested by condemnation in the city before sale under foreclosure, the purchaser at the sale is not entitled to the compensation awarded. *Matter of Washington Ave.*, 34 Misc. 655, 70 Supp. 599.

The transfer of lands under an agreement, secured by a mortgage on the premises by the grantee, to pay the amount of an award made for the land in condemnation proceedings, confers the right on a subsequent grantee of the original grantors to a proportionate part of the award and the right to maintain an action against the city making the same. *Youngs v. Stoddard*, 27 App. Div. 162, 50 Supp. 475, 84 St. Rep. 475.

All taxes and assessments which are valid liens upon premises at the time an award therefor is made, under chapter 56, Laws of 1894, may be deducted by the city from such award. *Deering v. City of N. Y.*, 51 App. Div. 402, 64 Supp. 606.

Under chapter 746 of the Laws of 1894, authorizing the former city of New York to take lands for a public park, taxes which were a lien upon the property should be deducted from the award. *Carpenter v. City of N. Y.*, 44 App. Div. 230, 60 Supp. 633, rev'g 27 Misc. 272, 58 Supp. 421.

If tenants are entitled to an award by virtue of their leases or rights in the property condemned, it must be taken out of the gross award, that being the full value of the fee. *Matter of Mayor, etc., of N. Y.*, 62 App. Div. 271, 70 Supp. 1127; aff'd on other ground, 168 N. Y. 254.

An award for land taken for a street which is part of an unopened street, laid out on a private map made by the owner of the land with reference to which he has made conveyances, but which does not appear on the official maps of the city, should be equitably divided between the owner of the fee and the abutting owners who have acquired easements thereon. *Matter of St. Nicholas Terrace*, 76 Hun, 209, 59 St. Rep. 109, 27 Supp. 765; aff'd, 143 N. Y. 621, 60 St. Rep. 476. Where the owners file a map of land laid out in streets, and containing a declaration that no dedication to public use is intended, and convey part of the land with reference to such streets, including in the conveyances land within the street line, the grantees acquire an easement in the land designated as streets, and the owners are only entitled to an award for the value of the land appropriated for the public use after deducting that of the private easement. *Matter of Adams*, 141 N. Y. 297, 57 St. Rep. 408.

A substantial award should be made to the abutting owners of a street in the city of New York, closed by condemnation proceedings; where the road-bed of the old road is concerned the same rule should apply. But nothing can be awarded for roads within the county of Westchester, *Matter of Dept. of Pub. Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 50. Where land taken for a public street is subject to an easement or right of way of the public or an individual, the award should pay not the full value of the property taken, but its value subject to such easement. *Matter of 116th St.*, 1 App. Div. 436.

Where a portion of leased land is taken for a public improvement, the apportionment of rent provided for in section 982 of the Consolidated Act relates merely to the ascertainment of the rent to be paid for the part not taken, and does not deprive the lessees of the right to recover damages sustained by reason of special losses arising from the destruction of the term as to the part taken. Where a portion of leased land is taken for a public improvement the lessees are not entitled to everything in the way of damages that they sustain, but a fair and equitable adjustment of the

award is to be made between them and the lessor, based on all the facts connected with the situations of the property, its uses, and value. *Matter of Daly*, 29 App. Div. 286, 51 Supp. 576, 85 St. Rep. 576.

An owner of perpetual easements of light, air, and access to land, where the servient land has been condemned by the city of New York for the purpose of its board of education, is entitled to the award for the easements thus appropriated by the city, without any deduction therefrom for taxes and assessments existing against the land to which the easements appertain. *Baker v. Mayor*, 31 App. Div. 112, 52 Supp. 533, 86 St. Rep. 533.

Where the city takes land for street purposes in advance of compensation and payment therefor, and allows interest thereon as compensation, it is improper for the commissioners, on awarding such interest, to assess any part thereof on the property-owner. *Matter of City of N. Y.*, 44 Misc. 126, 89 Supp. 769.

The owner of the fee of land subject to an easement and the owner of the easement are together the "owners" of the land. An award to unknown owners, made in condemnation proceedings for property taken by the city of New York, to open a street, does not constitute an adjudication that a person owning an easement, to which the land was subject, is not entitled to any part of the award. *Matter of Bd. of Street Opening*, 27 App. Div. 265; *sub nom. Matter of Decatur Ave.*, 50 Supp. 621, 84 St. Rep. 621; *aff'd*, 158 N. Y. 721.

Where the city of New York has acquired in condemnation proceeding, real estate upon which there is a mortgage not in default, the mortgagee loses his specific lien on the property, and acquires in lieu thereof the right to have his interest ascertained and the amount thereof paid by the municipality, under the Consolidation Act, and he has no standing to foreclose his mortgage thereafter. *Hill v. Wine*, 35 App. Div. 520, 54 Supp. 892; *Bryan v. Altieri*, 36 App. Div. 623, 55 Supp. 152.

The provisions of section 3378 do not violate the Constitution; the money takes the place of land and is subject to the same liens to which the land was before being taken. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116. Where the owner of land agreed to pay an attorney for his services a certain share of the award, such share to be a lien on the property, it was held that this did not render it a charge on the land in the hands of defendant. *Grigg v. McNulty*, 5 Misc. 334, 25 Supp. 504, 55 St. Rep. 210.

A claim by a county for unpaid taxes upon a portion of the award must be established by sufficient evidence to uphold the tax title. *Matter of N. Y. C. & H. R. R. Co.*, 90 N. Y. 342.

Where an order of commissioners directed the distribution of an award to unknown owners of land taken by a city for public use and a subsequent

order directed that the fund be paid to certain claimants it is error to insert in such latter order a provision that such fund be paid to the claimants or their attorneys, since to authorize its payment to any person other than the owner of the fee of the land taken there should be a power of attorney duly acknowledged so that there may be a public record of the receipt of the money. *Matter of the Mayor*, 20 App. Div. 404, 46 Supp. 832; aff'd, 155 N. Y. 638.

Taxes and assessments levied after the city had acquired title to property under the statute should not be charged against the award. *Matter of Morris Ave. in City of New York*, 118 App. Div. 117, 103 Supp. 180.

Where land was owned by a lunatic and his wife as tenants by the entirety, the committee of the lunatic is not entitled to any part of the award, but it should be deposited in court and retained until the death of either tenant and then paid to the survivor, the income in the meantime to be divided equally between the wife and the committee. *Matter of Bd. of St. Opening*, 89 Hun, 525, 35 Supp. 409, 69 St. Rep. 795. Where a mortgage given after the passage of the act authorizing condemnation of land for street purposes expressly excludes the land so taken and restricts the conveyances to the portions of the lot not taken, no intention to assign, where it is made after the lands taken, can be gathered therefrom. The contrary is true where the mortgage was given prior to the passage of the act. *Kuhlman v. City of Brooklyn*, 6 Misc. 429, 27 Supp. 126, 58 St. Rep. 584; aff'd, 149 N. Y. 584; *Burkhard v. City of Brooklyn*, 6 Misc. 431, 26 Supp. 1112, 58 St. Rep. 302. See, also, as to who is entitled to the award as between mortgagor and mortgagee, *Delapp v. City of Brooklyn*, 144 N. Y. 265, 63 St. Rep. 107, aff'g 3 Misc. 22, 51 St. Rep. 128, 22 Supp. 179; also, *Englehardt v. City of Brooklyn*, 44 St. Rep. 474, 19 Supp. 173.

As to when the grantee in a deed takes the award, see *Magee v. City of Brooklyn*, 140 N. Y. 265, 63 St. Rep. 107, aff'g 3 Misc. 620, 51 St. Rep. 433, 22 Supp. 1136. And as to what operates as an assignment of the award under like circumstances, *Sims v. City of Brooklyn*, 87 Hun, 35, 33 Supp. 859, 67 St. Rep. 611; aff'd, 147 N. Y. 703.

Under what circumstances an award paid over may be considered to be in court for claims by contestants, see *Matter of City of Rochester*, 136 N. Y. 83, 49 St. Rep. 86. The right to an award vests in the owners of the land at the time of the confirmation of the report. *Matter of Pierce*, 10 Supp. 31, 24 Abb. N. C. 134. And the owner acquires no vested right in such an award until the final confirmation of the report. *Snyder v. Rochester*, 90 Hun, 171, 35 Supp. 786, 70 St. Rep. 290, rev'g 8 Misc. 652, 29 Supp. 1005, 61 St. Rep. 63; dism'd, 155 N. Y. 619. An ancillary guardian is not entitled to an award for property of an infant, but it will be refused during the infant's minority, and the income paid

to the guardian. *Matter of Estate of Sproat v. Dept. Public Works*, 89 Hun, 529, 35 Supp. 332, 69 St. Rep. 743.

Where an award is made to "unknown owners" and upon application to the court for the payment of the award there appears to be conflicting claimants, the only question to be determined is, Who is the unknown owner? When ascertained he is entitled to the award the same as if he had been known and the award made to him by name; it is immaterial whether he owned an absolute fee or a fee subject to a public easement; the amount awarded must be taken to have been made for his interest whatever it was. *Matter of Dept. of Public Parks*, 73 N. Y. 560.

Where title to premises has vested in the city of New York before they have been sold in foreclosure, a purchaser at the sale is not entitled to the award—which may, where the commissioners are unable to ascertain the names of the owners of the parcel with sufficient certainty, be made to "unknown owners"—but where the award has been transferred in terms, by the decree of foreclosure and the referee's deed, to the purchaser, it must be made to him, and cannot lawfully be made to "unknown owners." *Matter of Washington Ave.*, 34 Misc. 655, 70 Supp. 599.

An award in proceedings taken by the city of New York to condemn land for a street should be made to the persons who owned the land when title to it vested in the city, but where owners of the lands on both sides of a street, running east and west, after conveying everything but the lands in the street, convey before confirmation of the report of the commissioners the lands on the south side of the street to the mesne grantee "together with all right of any nature or kind . . . in and to the adjacent streets and avenues," it is not so certain that the mesne grantee is not entitled to an award made for the lands taken on the north side of the street as to render it improper for the commissioners to make that award to unknown owners. *Matter of East 135th St.*, 36 Misc. 427, 73 Supp. 727.

Upon the foreclosure of a mortgage upon lands which have been taken for a city street, the lien of the mortgage covers so much of any damage awarded in the condemnation proceedings as is necessary to make good the deficiency.

The balance of the award above the payment of the deficiency judgment should be paid to trustees holding the lands for the benefit of persons having mechanics' liens thereon at the time they were taken by the city.

The right to compensation vests in the owners as a personal right at the moment of the taking of the property and interest begins to run from that date upon any award which may be made thereafter.

But sums due for taxes and assessments levied after the city became owner should not be deducted from the award.

When such taxes have been improperly withheld the person entitled to the award will not be remitted to a proceeding against the comptroller to recover the moneys, but the question may be disposed of in the condemnation proceeding. *Matter of Mayor (Morris avenue)*, 118 App. Div. 117, 103 Supp. 180.

When the abutting owner has conveyed after the award has been confirmed it does not pass when not expressly mentioned, and it should go to the grantor, not the grantee, as the conveyance carried only what the grantor owned at the time, and applying the equitable theory on which the award was apportioned to the grantor, she is either liable to the grantee to pay the assessment or the sale price was reduced in contemplation of the assessment. *Matter of City of N. Y. (Beverly road)*, 131 App. Div. 147, 115 Supp. 208.

ARTICLE X.

FINAL ORDER AND COSTS THEREON. §§ 3371, 3372, 3373.

Subd. 1. Final order, how obtained and contents, 572.

§ 3371. *Confirmation or setting aside report; deposit, when payable*, 572.

Subd. 2. Misconduct of commissioners, 575.

Subd. 3. Errors of commissioners, 579.

Subd. 4. Interest on the award, 587.

Subd. 5. Costs on final order, 591.

§ 3372. *Offer to purchase; costs; additional allowance*, 591.

Subd. 6. Final order and its effect, 601.

§ 3373. *Judgment; how enforced; delivery possession of premises; when writ of assistance to issue*, 601.

Subd. 1. Final Order, How Obtained and Contents. § 3371.

§ 3371. *Confirmation or setting aside report; deposit when payable.*

Upon filing the report of the commissioners, any party may move for its confirmation at a Special Term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of, the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

After the order is made appointing the commissioners in proceedings for the condemnation of real property, there is no further question between the parties except the amount of the damages.

The wife of one of the parties, who has an inchoate right of dower in the property taken and who is not made a party to the proceeding, cannot be heard to object to the confirmation of the report, as her rights and interests are not affected by the proceeding.

Nor can the holder of a mortgage upon the property, who is not made a party to the proceeding, be heard to object to the confirmation of the report of the commissioners, as the lien of her mortgage upon the lands sought to be taken will not be released until she consents or her mortgage is paid; but she is entitled to have the award applied to the payment of her mortgage and, for the protection of her rights, the money should be paid into court.

Nor can persons who appear in the proceeding simply as taxpayers and do not ask to be made defendants be heard to oppose the confirmation of the awards, where it does not appear that the finding of the commissioners is contrary to the interests of the taxpayers and no complaint is made that the damages are excessive. *Matter of Bd. of Supervisors*, 57 Misc. 665.

A motion to confirm or set aside is not a rehearing upon the merits of the matter on which additional proof can be given by either party. It is only where some of the commissioners are alleged to have been guilty of some misconduct or not to be disinterested that affidavits may be read upon those questions on an application to confirm the report. *Matter of Town of Guilford*, 85 App. Div. 207, 83 Supp. 312.

Upon an application to confirm the report of commissioners appointed in condemnation proceedings, the court may, under section 3371 of the Code of Civil Procedure (the Condemnation Law), either confirm or set aside the report, but has no authority to modify it by reducing the award thereby given and afterward to confirm it. *Matter of Central New York Tel. Co.*, 36 App. Div. 553, 55 Supp. 729.

Though the award of commissioners in condemnation proceedings does not state the facts considered in reaching the determination as to the value of the property condemned, the presumption is that they acted within the law, in the absence of anything in the record to the contrary, and that the award was supported by the facts, and where the plaintiff made no effort to secure a correction of the record, or the making of a supplemental report under the Code of Civil Procedure, section 3382, the report is properly confirmed. *Harlem River & Portchester R. R. Co. v. Reynolds*, 50 App. Div. 575, 64 Supp. 199.

Where a property-owner dies after receiving notice of motion to confirm the report of the commissioners and failure to appear at the hearing which was adjourned, his executors are not entitled to notice or to be made parties to the proceedings. *Matter of Lexington Avenue*, 44 St. Rep. 588, 17 Supp. 873.

The court has power in the proper case to grant leave to a party interested to file objections to the report of the commissioners, after the time fixed by them in their notice has expired. *Matter of 163d Street*, 61 Hun, 365, 40 St. Rep. 684; *dism'd*, 131 N. Y. 569.

The court must act solely on the report of the commissioners, and affidavits cannot be used to impeach or contradict it. The report must show that an error has been committed, or that injustice has been done, to enable the court to reverse or set aside the proceedings. *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. Where the parties have agreed as to the principles on which the appraisal is to be conducted, the court cannot interfere. *In re N. Y., Lackawanna & Western R. R. Co.*, 102 N. Y. 704.

The report may be amended by the commissioners to conform to the facts, by order of the court before it is filed; but they cannot hear proofs upon such correction. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. Pr. 177; *People ex rel. Mann v. Mott*, 60 N. Y. 649. Errors in the minutes of testimony attached to the report may be corrected by the commissioners, but an error in the admission of facts is not cured by the certificate of a member of the commission that the report was not affected by such evidence. *Matter of N. Y., W. S. & Buffalo R. R. Co.*, 33 Hun, 293.

The court at Special Term has power to vacate its order confirming the commissioners' report, and to set it aside for carelessness or irregularity amounting to injurious misconduct, or for palpable mistake or accident. The exercise of this discretion is reviewable at General Term, but not in Court of Appeals. The Special Term may further proceed to revoke the appointment of the commissioners and appoint new ones. This power is inherent in the court, and not dependent on the statute. *Matter of N. Y. Central, etc., R. R. Co.*, 64 N. Y. 60, *dism'g* appeal from 5 Hun, 105. To same effect as to appeal to Court of Appeals, *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 489.

The default of an owner upon the hearing before commissioners may be excused by the Supreme Court on motion to confirm the report, and the report set aside and a new hearing directed. *Matter of N. Y. & Lackawanna R. R.*, 93 N. Y. 385.

The Special Term may send a report back to commissioners to consider and pass upon the account of benefit, where no allowance or deduction therefor has been made in appraising the damages to respondent's land. *Matter of Kings Co. Elev. R. R. Co.*, 35 St. Rep. 367, 12 Supp. 198.

Where a sum is awarded for land taken, but no separate award to the owners of the minerals thereunder, an order confirming the report in part and sending it back to the commissioners to appraise the award between the owner of the minerals and of the surface is proper. *Matter of Daly*, 88 Hun, 188, 34 Supp. 414, 68 St. Rep. 421.

The court may modify an order where no award was made to an owner of land taken, who failed to appear before the commissioners. *Matter of 181st St.*, 35 St. Rep. 548, 12 Supp. 345. A report may be sent back for an apportionment of the award between joint owners after it has been confirmed. *Matter of Chapin*, 89 Hun, 603, 34 Supp. 1058, 69 St. Rep. 30.

It seems that, in proceedings under the Condemnation Law (Code Civ. Pro., § 3371 *et seq.*), the court has power, upon a motion to confirm a report of commissioners appointed under said act, to send the report back to the commissioners, with directions to them to specify in a supplementary report such particulars as will indicate the elements of the damages they have awarded or the principle upon which the award proceeded, or both; but such a course should not be taken unless it is made to appear that there is probable cause to believe that the commissioners have made a material error, which neither their report nor their minutes disclose.

No such order is proper where the moving party merely hopes that he may, by compelling the commissioners to respond to certain questions inserted in the order, discover some ground for opposing a confirmation of the report.

An order, sending such a report back to the commissioners, affects a substantial right and is appealable under section 1356 of the Code of Civil Procedure. *Bd. of Water Com'rs v. Shutts*, 25 App. Div. 22, 49 Supp. 319.

It is questionable whether, on a motion for the confirmation of the report of commissioners of appraisal appointed in a condemnation proceeding, the court has power to return the report to the commissioners with directions to state in a further report the grounds of their decision.

Even if the power exists, its exercise is not to be commended, and will not be sustained where it does not appear that the commissioners were guilty of misconduct or that there was irregularity in their proceedings.

The proper remedy, if the sum awarded be insufficient, is to set aside the report. *Waterford Electric Light Co. v. Reed*, 103 App. Div. 103, 92 Supp. 960.

The report of the commissioners may be affirmed or set aside but it may not be modified or changed in any respect. *Matter of Jones v. Village of Salamanca*, 129 App. Div. 717, 114 Supp. 707, citing *Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571; *aff'd*, on opinion of court below, 150 N. Y. 569; *Matter of Central New York Tel. Co.*, 36 App. Div. 553; *Matter of Town of Guilford*, 85 App. Div. 207.

Subd. 2. Misconduct of Commissioners.

Commissioners must be disinterested regardless of whether in a particular case the court may or may not be convinced that they have acted impartially. *Matter of Terminal Ry.*, 16 App. Div. 515, 44 Supp. 1012.

An improper communication signed by one of the claimants and sent to the commissioners making charges against attorneys and witnesses, which two of the commissioners did not read or give attention to, and which it does not appear the third commissioner ever read, does not afford a sufficient ground for refusal to confirm the awards of the commissioners and will not be presumed to have influenced them. *Matter of Johns v. Village of Salamanca*, 67 Misc. 521.

The Supreme Court may, in the exercise of judicial discretion, remove commissioners appointed by it in condemnation proceedings upon an appropriate application.

A motion to relieve commissioners of a consideration of the value of certain parcels and to appoint new commissioners for those parcels is in effect a motion to remove the commissioners.

Although one commissioner may be disqualified, the fact that his associates sat with him while hearing some of the testimony does not disqualify them. *Matter of Bensel (Kensico reservoir, section No. 11)*, 138 App. Div. 581.

While the court is authorized to remove commissioners for unfitness not necessarily involving moral turpitude, it will not remove commissioners for an honest error of judgment in the admission of evidence or for the adoption of an erroneous theory of appraisal.

The court on an application for the removal of commissioners of appraisal will not determine the propriety of their rulings on matters of evidence, or whether certain allowances should have been made in their appraisal.

Although commissioners of appraisal have held many unnecessary hearings and taken an unreasonable length of time in filing their report, they will not be removed from office for unfitness where their work is practically over and they are ready to report. But it seems the unreasonable delay and unnecessary hearings may be taken into consideration in fixing their compensation and the compensation of the claimant's witnesses. *Matter of Simmons*, 140 App. Div. 244.

It is good cause for the Special Term to set aside the proceedings in such cases if there has been such carelessness or irregularity on the part of the commissioners as amounts to misconduct, by which a party has been harmed. The same reason which would lead to the setting aside of the verdict of a jury, or report of a referee, for the misconduct, palpable mistake, or accident of either, will suffice for the like interference with the report of commissioners, and what would authorize the Special Term to excuse the default of a party, and to set aside an inquest or dismissal of a complaint taken at a circuit, will empower it to interfere in these cases. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

Where, on an application to set aside the report of commissioners appointed to take lands for railroad purposes, it appears that the commissioners had talked privately with a person from whom they had obtained information discrediting the testimony of the claimant, and that the award to him was greatly inadequate, and that the neglect to oppose the confirmation of the report arose from the neglect or misbehavior of his attorney, upon whom the notice of motion was served; *held*, that the report was properly set aside. *Matter of N. Y. C. & H. R. R. Co.*, 5 Hun, 105.

An objection to a report of commissioners of street opening, on the ground of the absence of one commissioner at the time of summing up by counsel after all the testimony was in, is waived where the objectant proceeds without any intimation of such an objection, and makes it for the first time after the award. *In re 181st St.*, 17 Supp. 917.

A report of commissioners appointed to appraise the damage to be occasioned by the taking of land for railroad purposes will not be set aside for their improper action in receiving, after the submission of the case and without the knowledge of the landowner, a written statement from the counsel of the railroad containing certain computations of the value of the premises to be taken, which computation had been made orally by the said counsel before the commissioners at the hearing. *Matter of N. Y., W. S. & B. R. R. Co. v. Church*, 31 Hun, 440.

The report of the commissioners cannot be affected by a certificate signed by one of them, setting forth the rule adopted by them in estimating the damages, nor will such a certificate cure any error by the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1.

Proceeding to remove a commissioner of appraisal appointed in condemnation proceedings upon the grounds that he was of a rancorous condition of mind, neglected his duties and had appeared as counsel for various clients in other proceedings of a similar character against the city. Evidence examined, and *held*, that an order denying the application to remove the respondent should be affirmed. *Matter of Low*, 142 App. Div. 533.

The fact that one of the commissioners was not a freeholder at the time of the application, but became such before he was actually appointed, does not affect the validity of the appraisal; but where the son of one of the commissioners was appointed as station agent of the petitioner's road, pending the proceeding, it was held sufficient ground to set aside the appraisal. *N. Y., W. S. & Buffalo R. Co. v. Townsend*, 36 Hun, 630. The fact that a person has been a city appointee, and is at times employed by the city, or was interested in the passage of the act appointing commission, does not disqualify him from acting as commissioner in proceeding by the city to acquire land. *Matter of Mayor*, 20 Misc. 520, 46 Supp. 640, dist'g *People ex rel. Edwards v. Potter*, 36 Hun, 181; *Matter*

of *Terminal Railway*, 16 App. Div. 516, citing *People ex rel. Downey v. Daines*, 38 Hun, 43; *Buckley v. Drake*, 41 Hun, 384.

Evidence to support a charge of bias on the part of one of the commissioners in condemnation proceedings and alleging that he held out for an unreasonably low valuation in order to force an inadequate award, held not sufficient to require the report to be set aside. *Terminal Railway of Buffalo v. Gerbereux*, 55 Misc. 1, 104 Supp. 737.

Section 46 of the Code, forbidding a judge from acting where he is related to any party within the sixth degree, does not apply in a street opening, and though the statute requires that every commissioner to be appointed must be a disinterested person, the fact that one of them is the brother-in-law of a person whose interest is likely to be affected by the proceeding is not a ground for the removal of such commissioner. *Matter of Ogden Street*, 63 Hun, 188, 43 St. Rep. 422, 22 Civ. Pro. 12, 17 Supp. 744, rev'g *Matter of City of Middletown*, 21 Civ. Pro. 201, which held the question of the illegality of the appointment of a commissioner cannot be raised after his report is confirmed. *Morris v. The Mayor*, 55 Hun, 476, 29 St. Rep. 376, 8 Supp. 763, rev'g 7 Supp. 943, 17 Civ. Pro. 407.

Where after the report had been made it was served when one of the commissioners was not a freeholder, it was held, in the absence of any allegation of improper conduct on his part, not to warrant setting aside report on motion by one of the parties who had consented to his appointment. *Matter of Application of N. Y., W. S. & Buffalo R. Co.*, 35 Hun, 575; cited, *Matter of McLean*, 138 N. Y. 163.

While it is true that courts will guard against improper influence and will require the avoidance of the very appearance of evil, yet no rule has yet been established which makes it necessary or proper for the court to set aside the report of commissioners simply because they have charged or received a fair and adequate compensation for the time they have given to their duties, and the services they have performed. So held where there was no agreement in advance as to fees, and after the report the commissioners were paid more than legal fees. *Matter of Staten Island Rapid Transit Co.*, 41 Hun, 393.

In *Re N. Y., L. & W. R. R. Co.*, 29 Hun, 1, it is said that the commissioner who has signed a report will not be allowed to stultify himself by an affidavit that he signed it without reading it or hearing it read. *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 How. Pr. 168. The fact that the wife of a commissioner is the cousin of a stockholder does not vitiate the appraisal. *Matter of the Albany Northern R. R. Co. v. Cramer*, 7 How. Pr. 164.

The award of drainage commissioners is not affected by the fact that one of the petitioners paid the commissioners' hotel bill, since Laws of 1886,

chapter 636, provides that in case the necessity for the drain is established, all the expenses of the commissioners shall be a lien on the land benefited, and in case the necessity for the drain is not established, the expense shall be borne by the petitioners; therefore, the petitioner gained nothing by said payment, nor was it misconduct on the part of the commissioners to take the advice of petitioner's counsel as to the necessary legal steps required of the commissioners, such as giving notice, where nothing is said as to any question of fact to be decided by them; nor is it misconduct in such case for one of the commissioners to subpoena witnesses, instead of causing it to be done by some other person. *In re Town of Penfield*, 69 Hun, 601, 23 Supp. 942, 53 St. Rep. 550.

Subd. 3. Errors of Commissioners.

A report of damages will be set aside where landowner declined to produce witnesses before the commissioners, in consequence of erroneous information as to his legal rights. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265. See, also, *N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 29 Hun, 602.

The report of commissioners is not conclusive upon them until they have filed it. *People v. Morrison*, 54 App. Div. 262, 66 Supp. 519; aff'd, 165 N. Y. 644.

An award of commissioners of appraisal will not be set aside as inadequate, unless the inadequacy is so palpable as to shock the sense of justice. *Matter of Daly*, 45 App. Div. 622, 61 Supp. 480.

It is not sufficient ground to set aside an appraisal, that during an examination of the premises by the commissioners, one of them was separated a part of the time from the others. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265.

If the commissioners reject legal and competent evidence, or mistake the principle that should govern the appraisal, the award should be set aside. *Matter of N. Y. C. R. R. Co.*, 15 Hun, 63.

Where the commissioners awarded much less than the value of the property taken, according to the testimony of every witness put upon the stand, it was held an arbitrary exercise of power not justified by law. *N. Y., West Shore & B. R. R. Co. v. Yates*, 18 Wkly Dig. 272.

The office of commissioners of appraisal is a public trust within the meaning of the Constitution, and the election of such commissioner to the office of justice of the Supreme Court disqualifies him from acting as commissioner. *Matter of Gilroy*, 11 App. Div. 65, 42 Supp. 640, 76 St. Rep. 640.

In condemnation proceedings the assessment of fee damage must be as of the date of the award, and a report will be sent back to the commissioners where it relates to an earlier date since which substantial changes

in the character and value of the property have been made. *Manhattan R. Co. v. Comstock*, 35 Misc. 326, 71 Supp. 941; judgment aff'd, 74 App. Div. 341, 77 Supp. 416.

The omission of the word "faithful" from the oath of the commissioners is material, and affects the proceedings unless waived, and objection on the ground of non-residence of the commissioners is not jurisdictional and may be waived. *Matter of Gilroy*, 85 Hun, 424, 32 Supp. 891, 66 St. Rep. 208.

In *Matter of acquiring title by the Mayor, etc.*, 20 Misc. 520, it was held that a person was not disqualified for appointment as commissioner because he had been a city appointee and was at that time employed by the city, nor was it a disqualification that one of the commissioners was interested in procuring the passage of the act for which the commission was appointed.

In a proceeding to take lands for railroad purposes, one who has acted as representative and agent of the petitioner in procuring rights of way along the proposed road is not an unbiassed commissioner, and the fact that he has acted as such is sufficient to require the setting aside of the award. *Rochester, Syracuse, etc., Co. v. Tolan*, 116 App. Div. 696, 101 Supp. 433.

Where owners of land taken by a city litigate before a commissioner of estimate and assessment without objecting to him and he thereafter makes affidavit that he had disposed of any property owned by him within the area of assessment before the filing of the final report, an objection to his competency to act comes too late when taken on confirmation of the report. *Matter of Summit Avenue*, 35 Misc. 59, 71 Supp. 207.

Commissioners of appraisal appointed in proceedings to condemn land for the purposes of a railroad company are not disqualified by the fact that they were formerly owners of stock and incorporators of the predecessor of the company bringing the proceeding, where they no longer hold any stock and have no interest in the company. *Matter of Brooklyn Elev. R. R. Co.*, 32 App. Div. 321, 52 Supp. 997, 86 St. Rep. 997.

The fact that one of the commissioners was not present at most of the hearings does not invalidate the proceedings. *Matter of Riverside Ave.*, 83 Hun, 50, 31 Supp. 735, 64 St. Rep. 366.

Where no irregularity appears to have intervened in any form in what took place before the commissioners, the report cannot be set aside. *Matter of N. Y. Elevated R. R. Co.*, 35 Hun, 417.

Greater latitude is given commissioners in condemnation proceedings in determining the extent of damages than is enjoyed by officials in most other judicial proceedings. The commissioners must be freeholders of the judicial district where the property is situated; they must view the premises; they must hear the proofs and allegations of the parties; but

in determining the compensation to be paid are at liberty to act largely upon their own best judgment as to the amount to be awarded, aided, of course, by such proofs as may be offered for that purpose, and their personal view of the premises. In receiving such awards the court will not, as a rule, disturb them unless the commissioners acted upon wrong principles, or their award is grossly inadequate. *Buffalo, Lockport R. R. Co. v. Phelps*, 52 Misc. 315 (318), 102 Supp. 214, citing *Matter of Boston Road*, 27 Hun, 409; *Matter of Mayor*, 99 N. Y. 569; *Matter of Union El. Ry. Co.*, 55 Hun, 163; *Matter of Newton*, 45 St. Rep. 18; *Matter of City of Rochester*, 137 N. Y. 423.

The fact that commissioners appointed to make awards on the condemnation of lands erroneously admitted evidence of the cost of reproducing certain buildings does not require a reversal if the award is supported by other competent evidence, and it is not shown affirmatively that the incompetent evidence led to the adoption of an erroneous principle.

Such commissioners are not bound by evidence of the owner's witnesses, but are judges of the weight thereof and of the credibility of the witnesses, and may make their award in the light of a personal inspection of the lands. *Matter of City of New York (Croton river dam)*, 129 App. Div. 711, 114 Supp. 68.

An award made in condemnation proceedings will not be set aside upon the ground that it is excessive or inadequate, unless it is palpably so or unless it appears that the commissioners adopted an erroneous principle as to damage. *Matter of Simmons*, 58 Misc. 581.

An award of damages made by commissioners appointed in condemnation proceedings, instituted by an elevated railway company in the city of New York to acquire easements appurtenant to property abutting upon the railroad, will not be disturbed unless the court can clearly see that they have proceeded upon an erroneous principle, or have been influenced by passion or prejudice, or have overlooked or disregarded the evidence.

In determining the amount of the damages, the commissioners are not confined to the testimony given by the witnesses for the respective parties, but may view the premises. *Matter of Manhattan Ry. Co. v. Comstock*, 74 App. Div. 341, 77 Supp. 416.

A report which awards a moderate compensation to the property-owner will not be disturbed. *Matter of N. Y., Woodhaven, etc., R. R. Co.*, 21 Hun, 250. A report will not be set aside unless the sum awarded is grossly inadequate, or some wrong principle was adopted in determining it. *Matter of Boston R. R. Co.*, 27 Hun, 409. The court will not set aside an appraisal as excessive, unless the excess is plain and palpable upon the evidence. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 116.

Where, upon an application to confirm the decision and report of commissioners appointed under section 193 of the Highway Law to determine

the necessity of laying out a public highway and to assess the damages, it appears from the record that they did not, before entering upon the discharge of their duties, take the constitutional oath of office, as required by section 194 of the Highway Law, their proceedings are void; and an order will be granted vacating and setting aside their proceedings and report. *Matter of Thompson*, 70 Misc. 285.

The court at Special Term will not set aside the award of commissioners of appraisal who, after viewing the premises condemned, award a sum as damages much lower than the value as testified to by the owner's witnesses and higher than that testified to by the witnesses on the other side.

To warrant the setting aside of the report of commissioners of appraisal it must appear not only that improper testimony was admitted, but that it affected the result directly and led to an award which was an injustice to one party or the other.

Thus where commissioners received evidence from a carpenter, mason, and plumber, objected to on the ground of showing structural value or cost of reproducing, and, therefore, incompetent on the value of the real estate as it stood, subject, however, to a motion to strike it out, and the motion was made and the decision reserved and the commissioners certified after their report was filed that they granted the motion and disregarded the testimony in reaching their conclusion as to value, this was not enough to show that the commissioners made their awards upon an erroneous principle, and it is not sufficient that they may have so acted. *Matter of City of N. Y. (Croton river dam)*, 129 App. Div. 707, 114 Supp. 75.

Where a house is taken in part for a street opening, an award of damages to it will not be set aside because \$500 more damages was awarded for a house two doors away, which witness testified was of the same value, and from which the same amount of frontage was taken. *Matter of Washington Ave.*, 34 Misc. 655, 70 Supp. 599.

Where commissioners appointed to make awards on condemnation proceedings have personally viewed the premises, the mere fact that the awards were largely under the estimate of value given by the owner's witnesses, and largely in excess of those of the condemnor, does not of itself require a reversal. *Matter of City of N. Y. (Croton river dam)*, 129 App. Div. 707, 114 Supp. 75.

A commissioner of appraisal having signed the report in condemnation proceedings against his will, in obedience to a writ of peremptory mandamus, the order for which was subsequently reversed as improperly granted, the order for confirmation of the report should be set aside, the act being done under duress and void. *Manhattan Ry. Co. v. Tompkins*, 59 App. Div. 572, 69 Supp. 668.

An award made by commissioners of estimate and appraisal in the city of New York, for a less sum than the estimate of any of the witnesses on either side, without a statement in their report of any basis or reason for their conclusion, should not be confirmed. *Matter of Bensel*, 68 Misc. 85.

Where claimant's uncontradicted evidence shows that the damages sustained by him by reason of the State's appropriation of a part of his farm are a certain amount, a judgment for a less amount will be reversed. *Lenhart v. State*, 75 App. Div. 162, 77 Supp. 397.

Although a court has power, upon proper cause shown, to deny a motion to confirm the commissioners' report, it is not sufficient cause to show that the commissioners erred as to the *quantum* of compensation awarded. *Matter of Prospect Park, etc., R. R. Co.*, 13 Hun, 345; s. c. on reargument, 16 Hun, 261.

Where awards by commissioners in condemnation proceedings are midway between the average amounts of the estimates of the witnesses of the respective parties and below computed amounts based on previous receipts for rentals, though the court might fix a lower figure from a consideration of the evidence the awards of the commissioners ought not for that reason to be denied confirmation. *Matter of Johns v. Village of Salamanca*, 67 Misc. 521.

A confirmation of a report of commissioners in condemnation proceedings, opposed on the ground that the award was inadequate, as the land had a special value other than for farm purposes, will be confirmed where the evidence, though justifying a larger award, was sufficient to sustain the finding of the commissioners. *N. Y. C. & H. R. R. Co. v. Sayles*, 52 Misc. 601, 103 Supp. 826.

In proceedings by a city to condemn property, the commissioners gave awards largely in excess of the estimates of the city experts but lower than the value given by the experts of the property-owners. *Held*, that the report of the commissioners would not be set aside at the instance of some of the property-owners because certain experts were allowed to give an incorrect basis of value, there having been some evidence to sustain the conclusion of the commissioners and it not appearing that they proceeded upon an erroneous theory. *Matter of Speedway*, 29 Misc. 519, 62 Supp. 424.

In *Matter of Collis*, 76 App. Div. 368, Woodward, J., discusses the effect of an award by commissioners, holding that it will not be set aside because inadequate or because excessive unless the award is palpably wrong. Citing *Perkins v. State of N. Y.*, 113 N. Y. 660.

The court will not disturb the determination of commissioners in condemnation proceedings for mere errors in the admission or exclusion of evidence unless they have proceeded upon a wrong theory to the prejudice of one of the parties. As commissioners view the premises, they may

take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. *Matter of City of N. Y. (Crotona park)*, 142 App. Div. 665.

Where commissioners of appraisal in condemnation proceedings viewed the premises, and the estimates of witnesses as to value differed materially, the award will not be disturbed, although it might be more satisfactory if smaller, where it does not appear that the commissioners proceeded on an erroneous principle, or were influenced by passion or prejudice, or overlooked or disregarded the evidence, and for that reason injustice has been done. *Manhattan R. Co. v. Comstock*, 74 App. Div. 341, 77 Supp. 416.

An award of commissioners appointed in a condemnation proceeding will not be set aside for inadequacy or on the ground that it is excessive, unless it is palpably wrong in either respect; nor will it be set aside for mere errors in the receipt or exclusion of evidence, or for an error of law other than the adoption of an erroneous principle in estimating the compensation. *Harlem River & P. R. R. Co. v. Reynolds*, 50 App. Div. 575, 64 Supp. 199.

The findings of the commissioners will not be disturbed unless it is apparent that injustice has been done or that they have overlooked some material feature of the case or proceeded upon an erroneous principle or been influenced by hearsay or passion. *Matter of Town of Guilford*, 85 App. Div. 207, 83 Supp. 312.

An award against a railroad company authorized to straighten its tracks, involving the changing of the channel of a river by taking out a bend in the course of the stream along which the claimant owned lands, by making an allowance for each running foot of the width of each parcel of land, the total being in excess of the damage involved, *held* erroneous as being made upon a wrong principle or palpably excessive. *N. Y. Central, etc., Co. v. Domprouff*, 63 Misc. 211, 116 Supp. 924.

An award for water rights appropriated will not be set aside because the commissioners understood it settled past as well as future damages, where nothing was in fact claimed or allowed for past damages.

The adoption of the cost of the property to the owner, deducting depreciation, as a basis for computing its value, will not make the award for the appurtenant water rights invalid where the amount thereof was within the evidence adduced. *Matter of City of Rochester*, 57 App. Div. 634, 69 Supp. 528; *aff'd* without opinion, 167 N. Y. 626.

An award made by commissioners will not be set aside for inadequacy, or as excessive, unless it is palpably wrong in that respect. *Matter of Brooklyn Elevated R. R. Co.*, 87 Hun, 88. In considering the proceedings of the commissioners, every intendment is in favor of their action,

which is not determined solely by the evidence, as they may view the premises to assist them in reaching a conclusion. A report may be set aside at Special Term for irregularity, error of law, and because of an excessive or insufficient award. Where the award is set aside by the Special Term, the Appellate Division has an inherent power to review the order. On such an appeal from a final order, the Appellate Division may direct a new appraisal, which, in that instance only, shall be final and conclusive. *Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571, 40 Supp. 326; aff'd, 150 N. Y. 569.

When the report discloses no erroneous methods of procedure, nor any erroneous principle adopted by commissioners to appraise damages, it is the duty of the appellate court to affirm the proceeding. *Matter of Buffalo & Geneva R. R. Co.*, 37 St. Rep. 343, 14 Supp. 1, citing *Matter of N. Y. Elev. R. R. Co.*, 12 Supp. 858, 35 St. Rep. 944. Since commissioners can gain more information from an inspection of the premises than from evidence, their finding will not be disturbed unless it is clearly apparent that injustice has been done. The report will not be set aside for technical errors in the admission of evidence, where no wrong principle has been adopted and the damages are not excessive. *Matter of N. Y. Elev. R. R. Co.*, 40 St. Rep. 647, 15 Supp. 909; *Matter of Thompson*, 85 Hun, 438, 32 Supp. 897, 66 St. Rep. 226; *Matter of City of Rochester*, 48 St. Rep. 358, 20 Supp. 506.

This is the rule even though the court on the examination of the evidence as it appears in the record might be of the opinion that the award is larger than it should have been. *Matter of N. Y. Elev. R. R. Co.*, 35 St. Rep. 947, 12 Supp. 857.

It is said that the court cannot suspend or correct the action of the commissioners nor set aside the proceedings, except when specially authorized by statute. Where commissioners took evidence, aside from that which was held on appeal to be a proper basis of decision, *held*, that as it did not appear that they intended any disrespect to the court, or arbitrarily to disregard its opinion, it was not such misconduct as would justify vacating the order appointing them. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 St. Rep. 456. Where the report of commissioners appointed to appraise the damages to be awarded to an abutting owner for injuries to his easement or other interest in that portion of the street occupied by an elevated railway did not set forth the particulars of the damages, as required by the court, it was held, on motion to set the report aside, that there was no such irregularity as required such action, but that the report should be confirmed, and then all questions, both of law and fact, that could in any form be reviewed on an appeal from an order confirming the report, could be reviewed by the appellate court. *Matter of N. Y. Elev. R. R. Co.*, 35 Hun, 414.

The report of commissioners appointed to fix the compensation to be paid owners will not be set aside although they disregarded the testimony of witnesses and formed their judgment by personal inspection. *Matter of Kings County*, 39 St. Rep. 876, 15 Supp. 516.

An award will not be set aside for inadequacy, unless it appeared that the commissioners proceeded on an erroneous principle. *Matter of Newton*, 45 St. Rep. 18, 19 Supp. 573; *Matter of Brooklyn Elev. R. R. Co.*, 87 Hun, 88, 33 Supp. 881, 67 St. Rep. 497. Where the estimates of witnesses are based on elements largely speculative, an award of a smaller sum than the average of the estimates will not be disturbed. *R. & H. V. R. R. Co. v. Myers*, 43 St. Rep. 734, 17 Supp. 311.

Courts will not set aside an award unless the compensation is too great, and unless the excess is plain. *Pecksport Con. Ry. Co. v. West*, 79 St. Rep. 644, 45 Supp. 644; modif'd and aff'd, 47 Supp. 230. The second award under a new appraisal will not be disturbed, when there is no legal error or irregularity, and the damages are neither grossly excessive nor insufficient. *Southern Boulevard R. R. Co.*, 49 St. Rep. 732, 20 Supp. 769.

An award will not be set aside for inadequacy or because excessive, nor for mere errors in the receipt or exclusion of evidence, to justify the reversal of error of law; it must be made to appear that the commissioners adopted an erroneous principle in estimating the compensation. *Matter of Daley v. Smith*, 18 App. Div. 194, citing *Matter of South Seventh Street*, 48 Barb. 16; *Matter of Gilroy*, 78 Hun, 260.

In the absence of palpable error in the principle on which the damages are awarded, the acts of commissioners in cases of this character are not to be set aside. *Matter of Brookfield (Sarles claim)*, 78 App. Div. 520 (524), citing *Matter of Gilroy*, 78 Hun, 260, 261; *Matter of Brooklyn Elev. R. R. Co.*, 87 Hun, 88; *Harlem River & P. R. R. Co. v. Reynolds*, 50 App. Div. 575; *Matter of Daly v. Smith*, 18 App. Div. 194; *Matter of City of Rochester*, 137 N. Y. 243, 246. See *City of Syracuse v. Stacey*, No. 1, 45 App. Div. 249, a case much in point.

The award of commissioners in condemnation proceedings will not be set aside unless they proceeded upon an erroneous principle. *Matter of Bd. of Public Improvement*, 99 App. Div. 576, 91 Supp. 161.

Where justice has not resulted, the consideration by the commissioners in condemnation proceedings, of evidence which would be inadmissible under the strict rules of evidence, will not prevent the confirmation of their report. *Village of Port Henry v. Kidder*, 39 App. Div. 640, 57 Supp. 102.

The report of commissioners will not be set aside except for error of law or for fraud or imposition, showing bias, prejudice, misconduct, or want of judgment. *Matter of Chapin*, 84 Hun, 490, 32 Supp. 361, 65 St. Rep. 559.

An award by commissioners in condemnation proceedings will not be interfered with as inadequate, where the commissioners viewed the premises, except in an unusual case. *Long Island R. R. Co. v. Reilly*, 89 App. Div. 166, 85 Supp. 875.

The land condemned having been examined by the commissioners, the fact that in some instances the structural value of the buildings and erections as testified to by both parties, added to the city's value of the land, was greater than the award will not justify setting it aside upon the ground that due weight was not given to the evidence as to the structural value; and, in such case, all structures being part of the realty, a separate report as to the value in each instance was unnecessary. *Matter of Simmons*, 58 Misc. 581, 109 Supp. 1036; aff'd, 130 App. Div. 350.

Where, on motion to confirm report of commissioners, the court is satisfied that they adopted an erroneous theory and applied a wrong principle in making their award of damages, their report should be set aside.

An award made in condemnation proceedings will ordinarily be sustained unless the commissioners have clearly gone astray or adopted erroneous principles in the assessment of damages. *Waterford El., L., H. & P. Co. v. Reed*, 47 Misc. 406.

The title to land proposed to be taken, as between the public and the individual, cannot be decided on the application to confirm the commissioner's report. *Matter of City of Yonkers*, 117 N. Y. 564, 28 St. Rep. 676; *Matter of Wells Av.*, 22 St. Rep. 648, 4 Supp. 301.

Provisions that all taxes and assessments which may be a lien shall be deducted from the award is improper where no further consideration of the tax lien was had on the appraisal. *Matter of So. St. Paul St.*, 85 Hun, 473, 33 Supp. 141, 66 St. Rep. 766.

Subd. 4. Interest on the Award.

It was held in *Matter of Trustees, etc.*, 137 N. Y. 95 (99), that the landowner should not have the possession of his land and at the same time receive the interest on its value. The only way the landowner can get interest upon the amount of the award is to enter a docket of judgment as provided in the Condemnation Law, and then he could collect interest upon his judgment as he could upon any other judgment.

Interest cannot be allowed in any case unless by virtue of some contract expressed or implied or of some statute, or on account of the default of the party when it is allowed as damages for a default.

It is further said that the Condemnation Law makes provisions for interest in the charter in but one case and that is where the plaintiff abandons the condemnation proceedings after the award and afterward renews it, and that the Supreme Court cannot arbitrarily order plaintiff in such proceeding to pay interest as damages for which by no default he has become liable. *Matter of Trustees*, 137 N. Y. 95

Interest on damages awarded an owner of land in the city of New York taken in a street opening proceeding, conducted under the Consolidation Act, accruing after title vested in the city, is no part of the award and merely follows it as matter of law.

Therefore, where the owner agrees to pay his attorney in the special proceeding 10 per cent. "of whatever award may be obtained" for the land, the attorney is entitled to 10 per cent. of the award made but to no percentage of interest which accrued thereon between the time when title vested in the city and confirmation of the report of the commissioners. *Matter of Bassford*, 36 Misc. 732, 74 Supp. 397; aff'd, 71 App. Div. 617, 76 Supp. 1009; modif'd, 172 N. Y. 488.

Semble, that the rule that an excessive demand is ineffectual to set interest running upon the sum actually due is of doubtful application where the whole amount of money which the party is entitled to receive is liquidated and the only question relates to interest. Under such circumstances, if the comptroller deems the demand excessive, he should offer to pay the sum concededly due. *Matter of City of N. Y. (In re Dorsett)*, 92 App. Div. 523, 87 Supp. 308; modif'd, 179 N. Y. 496.

The owner is entitled to interest from the date of taking. *In re Morris Ave.*, 118 App. Div. 117, 103 Supp. 180; *In re Opening of 178th St.*, 107 App. Div. 22, 94 Supp. 838; aff'd, 183 N. Y. 571.

The allowance of interest on an award for past or rental damages, against an elevated railroad company and in favor of an abutting owner, is discretionary with the court. *Kerr v. N. Y. El. Ry. Co.*, 49 Misc. 331, 96 Supp. 1021.

The interest on an award to an unknown owner of property in the city of New York is payable from the date when the title of property vests in the city up to the time of payment of the award, or the time when the same is paid into the Supreme Court. As soon as an award becomes due the city is not a bailee of the property-owner's money entitled to hold it until demand, but a debtor bound to seek out and pay its creditor. *Matter of Bd. of Street Opening*, 35 App. Div. 406, 54 Supp. 911.

The city of New York may deduct from an award made in condemnation proceedings, under the Laws of 1894, taxes and water rates which were liens upon the land at the time the city took title together with interest thereon to the date when the award became payable. Mortgagees of the premises taken are only entitled to interest on their mortgages to the date the award became payable. *Carpenter v. City of N. Y.*, 51 App. Div. 584.

The right of the claimant to interest on his award under section 4 of the act of 1894 does not accrue until he has made a demand upon the city of the precise sum to which he is entitled. *Deering v. City of N. Y.*, 51 App. Div. 402, 64 Supp. 606.

An owner of buildings injured by the opening or regulation of a street in the city of New York, but not taken for that purpose, is not entitled to interest on the award for such injuries, made to him under section 978 of the Consolidation Act (L. 1882, chap. 410). *People ex rel. N. Y. City Church v. Coler*, 60 App. Div. 77, 69 Supp. 863; aff'd, 168 N. Y. 644.

Nor is a demand made before the expiration of the four months effectual to charge the city with interest on the award. *Fredrichs v. City of N. Y.*, 44 App. Div. 274, 60 Supp. 724; aff'd, 165 N. Y. 656.

Taxes levied upon real property subsequent to an award but before the confirmation by the Special Term of an award made by commissioners in a proceeding appropriating and setting apart such property for a school site, directing the payment to the property-owners of a certain sum "subject to the lien of unpaid taxes, assessments and water rates," are not a lien upon the property and cannot be deducted from the amount awarded where it appears that the property in question was unimproved and produced no income. *Matter of Bd. of Education*, 169 N. Y. 456, rev'g 59 App. Div. 258, 69 Supp. 572.

Section 990 of the Greater New York charter providing that an award shall bear interest from the date of vesting title in the State to the date of commissioners' report, only applies to proceedings instituted under that act. *Matter of East 175th St.*, 49 App. Div. 114, 63 Supp. 468; aff'd on opinion below, 162 N. Y. 661.

Section 992 of the Consolidation Act, authorizing the allowance of interest on awards made in street opening proceedings from the time when the title to the land taken vests in the city, applies only to awards made for land, the title to which is taken by the city. *People ex rel. N. Y. City Church v. Coler*, 60 App. Div. 77, 69 Supp. 863; aff'd, 168 N. Y. 644.

Where the board of public improvements of the city of New York has by resolution declared that title to property to be taken for city purposes by commissioners of estimate and apportionment shall vest in the city before confirmation of their report, the city charter (L. 1897, chap. 378, § 90), authorizes them to allow, and include in their assessment for benefit, interest on the value of the said property from the date of its vesting in the city to the date of their report.

This declaration of the rule of damages is one within the power of the Legislature. *Matter of East 158th St.*, 39 Misc. 598.

The provisions of the charter of the city of New York with reference to the payment of interest upon the award in which the city has four months after the confirmation of award for its payment do not affect the landowner's right to interest but merely fixes a period during which, for the convenience of the city, the landowner may not enforce its payment. *Matter of Bd. of Street Opening*, 21 App. Div. 357, 47 Supp. 564.

Where the award is made to unknown persons, in default of proof by the claimant of his identity with the unknown owners, the wrong of the city or of its officers, which justifies the right to interest for a period of more than the six months, must necessarily be found in some neglect or omission of the city or of its officers after the petitioner has claimed the awards standing due to unknown owners.

Where a person claiming to be entitled to an award made to unknown owners presents a claim for payment of the award to the comptroller more than six months after the date of the confirmation of the report, and upon the refusal of the comptroller to pay the award over to him institutes a proceeding to compel the payment of the award to him before the expiration of a year from the date of the report, he is only entitled to interest on the award for the six months succeeding the date of the confirmation of the report. *Matter of City of N. Y. (Montgomery St.)*, 91 App. Div. 532, 86 Supp. 1035.

In condemnation proceedings by the city of New York, where after an original report the matter is sent back to the commissioners with directions to make a different award, the supplemental report should calculate interest up to its date and not to the date of the original report, which interest begins to bear interest as a new principal from the later date only. *Matter of Mott Haven Canal Docks*, 196 N. Y. 175, modif'g 133 App. Div. 890.

Where the order of confirmation is opened as a favor to the property-owner, who stipulates to claim only the value of the land as of the value when the original assessment was made, he is estopped from claiming interest on the award made on the rehearing. *Matter of 181st St.*, 44 St. Rep. 534, 18 Supp. 264.

Interest on the award runs only from the date of the filing of the final order. *Trustees of N. Y. & Brooklyn Bridge Co. v. 3d M. E. Church*, 45 St. Rep. 615, 18 Supp. 257.

But where a time is fixed in which an award is made payable by statute, interest on it is to be computed from such time, unless the owner remains in possession. *Supervisors of Erie v. City of Buffalo*, 63 Hun, 565, 45 St. Rep. 365, 18 Supp. 635. And where such owner has been left in possession, interest will not run on the award until payment has been demanded, or action taken by mandamus or otherwise to fix the liability of the city. *Donnelly v. City of Brooklyn*, 121 N. Y. 9, 30 St. Rep. 501, aff'g 26 St. Rep. 27, 7 Supp. 49. Where the owner of the property, however, neglects, after confirmation, to satisfy mortgages and convey her property, she cannot maintain an action for interest on the award. *Devlin v. Mayor*, 60 Hun, 68, 37 St. Rep. 951, 14 Supp. 251.

Where land is condemned for public use, the market value at the time when the act of appropriation was passed should govern, and owners are

not entitled to interest upon the award from the passage of the act until the award is paid, nor should they be allowed for taxes paid during this period. *Matter of Dept. Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

An award of damages for impairing plaintiff's water supply, delayed for six years, should either allow interest or past damages. *Village of Port Henry v. Kidder*, 39 App. Div. 640, 57 Supp. 102.

Mortgagees of the premises taken are only entitled to interest on their mortgages to the day when the award became payable. *Carpenter v. City of N. Y.*, 51 App. Div. 584, 64 Supp. 839.

The right of a claimant to interest on his award, under section 4 of chapter 56, Laws of 1894, does not accrue until he has made a demand upon the city for the precise sum to which he is entitled. *Deering v. City of N. Y.*, 51 App. Div. 402, 64 Supp. 606.

The right to damages accrues immediately upon the vesting of the title in the city, even though the amount thereof be not fixed until long afterward; and interest begins to run upon the award from the date the title vests. *Matter of Mayor (Morris avenue)*, 118 App. Div. 117, 103 Supp. 180.

On the condemnation of lands by the city of New York interest on an award made to unknown owners pursuant to section 6 of chapter 130 of the Laws of 1895, as amended, begins to run from the date the title vested in the city by virtue of the confirmation of the award. But, it seems, the city may relieve itself from the payment of interest on such award by paying the amount into court. *Matter of Cammann*, 143 App. Div. 223.

Where on the closing of a street an abutting owner has been deprived of his easements therein the award should include, not only the value of the easements taken, but interest thereon down to the date of the report. But the interest forms part of the compensation or damages, and should be awarded as such, though it is not necessary that it should be separately stated as interest. *Matter of Minzesheimer*, 144 App. Div. 576.

Subd. 5. Costs on Final Order.

§ 3372. Offer to purchase; costs; additional allowance.

In all cases where the owner is a resident and not under legal disability to convey title to real property, the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated, and which cannot be given in evidence before the commissioners or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the

amount of the offer, with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic, or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses, and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the Supreme Court.

A proceeding to acquire land under the General Railroad Act is a special proceeding, and the court has power, in its discretion, to allow costs in such proceedings at the rate allowed for similar services under the Code. *Matter of Rensselaer & S. R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 311; *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 592. When no issue of fact is raised or tried, a trial fee cannot be allowed, although witnesses' fees and disbursements may be allowed. 26 Hun, 592.

Commissioners have no authority to fix any allowance for counsel fees, but that power is vested in the court. *Matter of Daley*, 91 Hun, 641, 37 Supp. 128, 72 St. Rep. 735.

Where the court as a matter of favor opens the default of an owner who fails to appear before commissioners and sends back their report for further hearing, the party relieved should pay the costs of the former hearing. *Matter of Brownell Street*, 44 St. Rep. 485, 17 Supp. 747.

A defendant in condemnation proceedings is only entitled to costs on the preliminary hearing where the petition is dismissed. *Dansville R. R. Co. v. Hammond*, 77 Hun, 39, 59 St. Rep. 49, 28 Supp. 454.

A proceeding by the board of education of a city to acquire land for public school purposes is a "special proceeding" as distinguished from an "action," as those terms are defined by Code of Civil Procedure, sections 3333, 3334, 3343, subd. 20, and should, therefore, terminate in a final order, not in a judgment; and a judgment in favor of a respondent therein for his costs should be vacated on motion. *In re Bd. of Education of the City of Brooklyn*, 11 Supp. 780.

Under section 159 of the Village Law (Laws of 1897, chap. 414, as amended by chap. 68 of the Laws of 1901), relative to the recovery of damages resulting from changing the grades of village streets, the petition-

ing property-owner is not entitled, as a matter of right, to costs except for proceedings after the appointment of commissioners; the costs incurred prior to that time are in the discretion of the court, as in a special proceeding, to be allowed under section 3240 of the Code of Civil Procedure. *Matter of Bley v. Village of Hamburg*, 84 App. Div. 23.

The right to costs, in condemnation proceedings taken under a special statute, containing no provision for costs or allowance, is governed by the general statute as to costs in special proceedings (§ 3240, Code Civ. Pro.) which gives only the specific costs allowed for similar services in an action, and does not authorize any additional allowance. *Matter of City of Brooklyn*, 148 N. Y. 107.

The only case in which a defendant in condemnation proceedings is entitled to costs upon the preliminary hearing is where he succeeds in having the petition dismissed. *Dansville, etc., R. R. Co. v. Hammond*, 77 Hun, 39, 28 Supp. 454.

In *Matter of Lake Shore & Michigan Southern R. R. Co.*, 65 Hun, 538, 20 Supp. 573, costs, together with extra allowance, were allowed to the petitioner exclusive of the counsel fee.

Where the compensation awarded to the owner of real property, by the commissioners in a condemnation proceeding instituted under section 3372 of the Code of Civil Procedure, exceeds the amount offered by the corporation seeking to condemn the property, with interest from the time the offer was made, the landowner is entitled to recover the same amount of costs that a defendant may recover under section 3251 of the Code of Civil Procedure when he has prevailed in an action in the Supreme Court after a trial; \$10 costs for proceedings before notice of trial and \$15 after notice of trial, with \$30 costs for a trial of an issue of fact and \$10 for a trial occupying more than two days. *Matter of Brooklyn Union El. R. R. Co.*, 176 N. Y. 213, rev'g 82 App. Div. 567, 81 Supp. 527.

Where a railway company seeks to condemn, in a proceeding taken under the Condemnation Law, real property held in severalty by the defendants, and some of them default in the proceeding, some appear and consent to condemnation, others appear and object to the jurisdiction and still others answer under the Code of Civil Procedure, section 3365, but not by the same attorneys, the proceeding constitutes, in effect, as many distinct proceedings as there are owners of distinct parcels, and this justifies a separate judgment as to each and entitles each successful owner to costs as a matter of right. *Schenectady Railway Co. v. Lyon*, 44 Misc. 275, 89 Supp. 908; aff'd, 99 App. Div. 619, 90 Supp. 1113.

Separate bills of costs are not allowed against defendants who are proceeded against as partners and joint owners of the property, and who jointly answer. *City of Syracuse v. Benedict*, 86 Hun, 343, 33 Supp. 944, 67 St. Rep. 614.

One petition to acquire the land of several owners is but one proceeding, and requires one appeal and one allowance of costs. *Matter of Prospect Park, etc., R. R. Co.*, 67 N. Y. 371, aff'g 8 Hun, 30.

The court has power to grant an additional allowance where no offer to purchase has been made, even when an answer has been interposed and the hearing was not difficult or extraordinary, but the defendants are not entitled to a trial fee, as the hearing is not a trial; nor do sections 3251 and 1015 control the amount of costs. *Matter of L. S. & M. S. R. R. Co.*, 65 Hun, 538, 48 St. Rep. 360, 20 Supp. 573. The extra allowance contemplated by section 3372 is intended as an indemnity to the prevailing party for expenses necessarily or reasonably to be incurred in the proceeding. *St. Lawrence & Adirondack R. R. Co. v. DeCamp*, 52 St. Rep. 10, 23 Supp. 544.

In proceedings in the United States Federal court to acquire lands in this State, provisions of the Code as to extra allowance are applicable. *United States v. Engeman*, 27 Abb. N. C. 141. Section 3054, limiting extra allowances to \$2,000, does not apply to allowances in condemnation proceedings. *Matter of City of Brooklyn*, 10 Misc. 650, 24 Civ. Pro. 182, 32 Supp. 182, 65 St. Rep. 261.

There is no authority for granting an extra allowance in condemnation proceedings to a defendant who was successful on the trial of the issues raised by his answer to the petition.

The word "allowances" as used in section 3369 of the Code of Civil Procedure does not mean extra allowance. *Erie & Jersey Railroad Co. v. Brown*, 123 App. Div. 655, 107 Supp. 989.

The court is only permitted to award an extra allowance to commissioners in a street opening proceeding in cases which are more difficult than the ordinary proceeding of that character. *Matter of City of New York (In re Butler St.)*, 49 Misc. 609, 99 Supp. 1109.

An extra allowance can be granted as a condition of discontinuance after report and before confirmation. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How N. S. 190.

Where the proceedings embraced a large number of parcels of property and involved unusually difficult questions of law and fact, the commissioners are entitled to extra allowance. *Matter of Mayor*, 24 Misc. 558. See act amending section 3370, Code of Civil Procedure, in relation to fees of commissioners in condemnation proceedings, by allowing additional compensation not exceeding \$25 a day in proceedings within New York and Kings counties. Laws of 1898, chapter 384. The General Term has no power, on reversing an order confirming a report of commissioners awarding damages, to award costs against the landowner. *Matter of N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 287.

An application by commissioners of estimate and assessment for an extra

allowance under section 1000 of the Consolidation Act must be made at the time of the taxation of costs, and the court has no authority to make such allowance at any other time or upon notice to the corporation counsel alone. *Matter of Mayor*, 29 App. Div. 367, 85 St. Rep. 470.

In condemnation proceedings to acquire land for a public park in the town of Rye, *held*, that in the county of Westchester the court in making allowances would not consider under the clause providing for "just compensation" any unusual compensation paid by the owner to counsel or expert witnesses, and would ordinarily make the same allowance for such expenses to each side of the controversy. *Matter of Studwell v. Halstead*, 62 Misc. 330, 116 Supp. 68.

The costs on an application for "an abandonment and discontinuance of the proceedings" are regulated by section 3374 of the Code of Civil Procedure. *Matter of Village of LeRoy*, 35 App. Div. 177, 55 Supp. 149.

The provisions of sections 3369 and 3372 of the Code of Civil Procedure, allowing costs of trial in proceedings to condemn lands, refer to the trial of issues raised by the answer to the petition, which is the only "trial" in such proceedings. When judgment is given against defendant, on such issues, plaintiff is entitled to costs before and after notice of trial and to a trial fee.

Section 3372 of the Code of Civil Procedure provides for costs upon the hearing before commissioners if no offer be made by the plaintiff, or if, in the case of an offer, the recovery be larger than such offer; hence, when no offer is made by plaintiff, defendant is entitled to costs before and after notice of trial and to a trial fee on a hearing before commissioners. *New York, O. & W. R. R. Co. v. McBride*, 45 Misc. 516, 92 Supp. 31.

Proceedings before the commissioners do not constitute a trial. Such proceedings are a mere assessment of damages. The trial spoken of in the statute is that which takes place preliminary to the appointment of the commissioners. So held in affirming an order which struck out from a bill of costs the trial fee before the commissioners. *Matter of Manhattan Ry. Co. v. Kent*, 80 Hun, 559; *aff'd*, 145 N. Y. 595; followed in *City of Johnstown v. Frederick*, 35 App. Div. 45. Both of these cases were cited and followed, as was also *Village of St. Johnsville v. Cronk*, 55 App. Div. 633.

In *Matter of Brooklyn Union El. Rd. Co.*, 82 App. Div. 567, and in *Matter of Bley v. Village of Hamburg*, 84 App. Div. 23, 82 Supp. 35, an order striking out the trial fee before the referee was affirmed.

Under section 3372 of the Code of Civil Procedure, a defendant in a condemnation proceeding, who, after an assessment of damages by the commissioners, is awarded a greater sum for his property than was offered to him by the corporation seeking to condemn, is not entitled to recover costs as though a trial has been had. *Matter of Brooklyn Union El. R. R. Co.*, 82 App. Div. 567, 81 Supp. 527; *rev'd*, 176 N. Y. 213.

In proceedings to ascertain the compensation to be made to the defendants on the condemnation of real estate, where an answer is interposed and a trial is had before a referee, on whose report judgment is entered in favor of the plaintiff, the defendants are not entitled to recover the costs of the trial, but only the costs on the proceeding to assess damages before the commissioners arising subsequent to the trial of the issue raised by the petition and answer. In such a case the defendants are properly allowed the fees and mileage of necessary and material witnesses produced by them before the commissioners on successive adjourned days. *City of Johnstown v. Frederick*, 35 App. Div. 44, 54 Supp. 412.

When on condemnation proceedings to acquire lands for the erection of a municipal lighting plant, the landowners refuse an offer to purchase and interpose an answer denying the material allegations of the petition and alleging that public use does not require the condemnation of the property, on which issue they are defeated but are successful in obtaining a more favorable award than the sum offered, both parties are entitled to costs, to wit, the petitioner is entitled to the cost of the trial of the issue before the court and the defendant to a full bill of costs for the proceedings before the commissioners. In such case the trial of the issue as raised by the answer and the proceedings before the commissioners are separate and independent as regards the question of costs. *Matter of Village of Theresa*, 121 App. Div. 119, 105 Supp. 568.

Under section 3372 of the Code of Civil Procedure, which provides that if the plaintiff in a condemnation proceeding does not make an offer to purchase the property sought to be condemned before serving the petition, the defendant is entitled to costs, the deposit with the court, after the commissioners have reported, of the amount of their awards, is not equivalent to the offer to purchase, although the report is set aside and the property is condemned under an amended petition subsequently served. *City of Syracuse v. Stacey*, No. 2, 45 App. Div. 260, 60 Supp. 1106.

Where an adult owns an undivided three-fourths of the land sought to be condemned by a railroad company and claims to own it all, and there are five infants who claim an interest in the land, in support of whose claim judgment has been rendered, and there are liens thereon, the railroad company may properly institute proceedings for its condemnation upon the ground that it is unable to agree with the owners for the purchase of the land within the meaning of section 90 of the Railroad Law. *Stillwater & M. Street R. R. Co. v. Slade*, 36 App. Div. 587, 55 Supp. 966.

It is error to charge the owner with service and expenses of commissioners in a case where a less amount was awarded than the company had offered, when it appeared that the acceptance of the offer would have deprived the owner of costs in a pending ejectment suit. *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun, 83.

The offer to sell at a specified price lands which had been selected for condemnation by the city of New York, under section 1436c of the charter of Greater New York, must be made by the owner or by a person duly authorized to act for him, in such form that the offer, if accepted by the city, would entitle it to specific performance of the contract. *Matter of City of New York (In re Baker)*, 112 App. Div. 160, 98 Supp. 331.

Any words which show the inability to agree will suffice, although the exact words of the statute need not be followed. *In re Metropolitan El. Rd. Co.*, 12 Supp. 506.

Where there is no allegation in the petition or proof that the plaintiffs have made an offer to purchase the property, though there is an adjudication of another court that the parties were unable to agree as to the price, defendants are entitled to costs. *Matter of Manhattan Railway Co. v. Kent*, 80 Hun, 557, 30 Supp. 957, 62 St. Rep. 569.

The inability of a street surface railroad company "to agree for the purchase of any such property" which, under said section 90, is a ground for condemnation, does not sufficiently appear unless the railroad company is able to show that, by offer, negotiations, and reasonable effort, it has made an attempt to reach an agreement with the owners of the real property sought to be condemned. *Schenectady Ry. Co. v. Lyon*, 41 Misc. 506; 85 Supp. 40; aff'd, 88 App. Div. 201, 84 Supp. 759.

The provisions of the Condemnation Law contained in section 3372 of the Code of Civil Procedure, that the plaintiff before serving his petition and notice may make a written offer to purchase the property at a specified price, and further that if no offer is made the court shall in the final order direct that the defendant recover the cost of the proceeding, and may also grant an additional allowance, do not apply to a situation where the defendants are under a legal disability to convey.

Under such circumstances an offer would be an idle ceremony, and, therefore, the reason for charging a plaintiff with costs for not making an offer entirely fails. *Manhattan R. R. Co. v. McKee*, 1 App. Div. 488, 37 Supp. 269.

Where, in a special proceeding by the trustee of a school district to acquire land for a schoolhouse site, the award of the commission exceeded the amount offered defendant landowners for the land involved prior to the institution of the proceedings, defendants were entitled to costs. *Mead v. Conger*, 97 Supp. 526.

The fact that a plaintiff in proceedings to acquire the title to real estate became entitled to the costs of the trial of the issue made by the pleadings, under the provisions of section 3372 of the Code of Civil Procedure, does not deprive the defendants of their right to other taxable costs in the proceedings; the provisions of such section give to a defendant in such proceedings, in case an award is obtained greater than the offer made, an

absolute right to taxable costs of which he cannot be deprived by the court. *Manhattan R. R. Co. v. Taber*, 78 Hun, 434, 29 Supp. 220.

It is not a condition precedent to a city's right to institute condemnation proceedings for the acquisition of land for a public improvement that it should have endeavored to acquire title to the necessary lands by voluntary purchase, although authorized so to do by the statute governing the proceeding. *Matter of City of N. Y.*, 104 App. Div. 445.

It has been the settled practice of the courts not to allow costs in proceedings for condemning the right of way for elevated railroad. *Matter of the Union Elevated R. R. of Brooklyn*, 55 Hun, 161, 28 St. Rep. 386, 7 Supp. 853. Where there is no statute providing for costs and disbursements in legal proceedings, none can be recovered. The authority given by section 3372 of the Code to grant an extra allowance to a defendant in condemnation proceedings relates entirely to proceedings taken under chapter 23 of the Code, and does not extend to proceedings taken under a subsequent special statute. In such proceedings taken under a special statute, where there is no provision for costs, they are governed by the general statute as costs in special proceedings, section 3240, which does not authorize an additional allowance. *Matter of Application of the City of Brooklyn*, 148 N. Y. 107; *Matter of Application of the Grade Crossing Commissioners of the City of Buffalo*, 20 App. Div. 271.

Laws of 1898, chapter 182, section 149, provided that cities of the second class might acquire land for municipal purposes by condemnation proceeding in the manner allowed by the charters of the respective cities at the time of taking effect of the act. The city of Rochester thereafter condemned land under its charter which provided that said proceeding should be conducted under the Condemnation Law (Code Civ. Pro., §§ 3357-3384). *Held*, that the owner of the property condemned, who accepted the award, but reserved the right to costs and allowances, was entitled under the Code of Civil Procedure, section 3372, to recover the costs of the proceeding. *Matter of Rochester*, 181 N. Y. 322, rev'g 97 App. Div. 643, 90 Supp. 1091.

Where a plaintiff in condemnation proceedings joins several persons having no unity of interest as defendants and the compensation awarded them exceeds the amount of the plaintiff's offer, each defendant is entitled to costs under section 3372 of the Code of Civil Procedure.

This is true although several of the defendants appear by one attorney.

It seems that where defendants appearing by the same attorney join issue by an answer contesting the right of the plaintiff to maintain the proceeding, so that there is a unity of interest in the defense, but one bill of costs should be allowed. *Dexter & Northern R. R. Co. v. Foster*, 142 App. Div. 240.

The fees of commissioners appointed in a proceeding to acquire lands

for additional water supply for the city of New York should be an equivalent for the work done and the time properly required for doing it. The statute does not require a *per diem* allowance.

In applying for an allowance the commissioners should show the time actually and necessarily consumed in their sessions, or submit their full minutes as an indication thereof, and give an estimate of the time taken by them in connection with their business, if any, outside their sessions, and a statement of the character and nature of their services. A mere statement of the number of sessions held without particulars as to the time actually and necessarily consumed thereby is not sufficient.

Commissioners may apply for fees when a matter dealt with in a separate and distinct report is completed. *Matter of Bensel (Kensico reservoir, section No. 6)*, 141 App. Div. 841.

The provisions of section 3254 of the Code of Civil Procedure are applicable to allowances for counsel fees in proceedings for the acquisition of lands under chapter 724 of the Laws of 1905, providing for an additional water supply for the city of New York, and prevent the allowance of more than \$2,000 for counsel fees to any claimant in such proceedings. *Matter of Simmons (Section 2)*, 71 Misc. 152.

In condemnation proceedings brought in pursuance of chapter 146 of the Laws of 1909 for the acquisition of a toll bridge, the owner, although not entitled to costs under section 3372 of the Code of Civil Procedure because under legal disability to convey title to the property acquired, is, nevertheless, entitled to costs under section 3240 of the Code at the rates allowed to the defendant for similar services in an action brought in the Supreme Court, including the costs before and after notice of trial, and a trial fee; but no extra allowance of costs is permissible. *Matter of People of the State of N. Y.*, 70 Misc. 72, 129 Supp. 1007.

On the condemnation of lands under chapter 724 of the Laws of 1905, providing for an additional water supply for the city of New York, the allowance of cost is governed by section 13 of that act. The parties are not entitled to costs as in an action under section 3240 of the Code of Civil Procedure. *Matter of Simmons (Ashokan reservoir, section 6)*, 130 App. Div. 350, 114 Supp. 571; *aff'd*, 195 N. Y. 573.

One holding an unexpired lease of lands taken by eminent domain is an owner within the meaning of section 3358 of the Code of Civil Procedure, and if a resident and under no legal disability to convey his title is entitled to costs under section 3372 of the Code of Civil Procedure if an offer to purchase has not been served upon him. *People v. Thornton*, 122 App. Div. 287, 106 Supp. 704.

Where the issues raised by the petition for the appointment of commissioners to appraise the petitioner's damages, and the answer filed by the village, are tried before a referee, who determines them in favor of

the petitioner, it is competent for the court to insert in the order confirming the referee's report and appointing the commissioners of appraisal, a provision awarding costs to the petitioner. If, however, the court neglects to do so, the county clerk has no power, after the commissioners have appraised the petitioner's damages and the court has confirmed their report with costs to the petitioner, to tax in favor of the petitioner the costs of the proceedings before the referee, as well as the costs of the proceedings before the commissioners of appraisal. *Matter of Bley v. Village of Hamburg*, 84 App. Div. 23, 82 Supp. 35.

An application to the Special Term, under section 11 of the General Railroad Act, by a railroad company for authority to construct its road upon the street in an incorporated village, is a special proceeding, and costs as of an action are allowable therein in the discretion of the court under section 3240. *Matter of Lima, etc., R. R. Co.*, 68 Hun, 252. Cited, with approval, *Hornellsville Railroad Co. v. N. Y., L. E. & W. R. R. Co.*, 83 Hun, 407, where it is held that such a proceeding is not a condemnation proceeding to acquire title to land in the strict sense of the term, and that the rule of discretion in regard to the granting of costs is applicable to such a proceeding. That the word "trial" as used in section 3372 of the Code refers to the trials of the issues raised by the petition and answer referred to in section 3367.

Where the court has awarded costs, its judgment cannot be reviewed in this respect on taxation; the remedy is by motion to correct the judgment and by an appeal from an order denying such motion, if it is denied, or by appeal from the judgment. *Matter of Manhattan Railway Co. v. Youmans*, 81 Hun, 82, 30 Supp. 566, 62 St. Rep. 562.

Where it was provided that commissioners should "receive as compensation the sum of \$10 per day for each day actually employed," an unimpeached affidavit made by each commissioner of appraisal, stating that he has been actually employed as such for a certain number of days, entitles them, *prima facie*, to compensation at the rate prescribed in the statute. *Matter of Collis*, 80 App. Div. 287, 80 Supp. 307.

This case distinguished *Matter of City of N. Y.*, 77 App. Div. 433, which arose under the Greater New York charter, upon the ground that the charter provision was much more specific than the statute. It was held in 77 App. Div. that the commissioners were not entitled to charge fees for attending meetings at which nothing was done, or which were unnecessarily adjourned.

Fee of commissioners appointed in a proceeding to acquire lands for an additional water supply for New York city cannot be awarded by the court on a mere statement of the number of days they were engaged in inspecting the property, in conferences, in taking testimony, etc., where they do not show that such time was necessarily consumed, and there is

nothing to show the value of their services in that the minutes of their proceedings are not before the court, or affidavits stating their own opinion as to the value of their services, or that they were necessarily or actually occupied during all of the time for which they claim compensation. *Matter of Bensel (Ashokan reservoir, section No. 16)*, 142 App. Div. 217.

Subd. 6. Final Order and Its Effect.

§ 3373. Judgment, how enforced; delivery possession of premises; when writ of assistance to issue.

Upon the entry of the final order, the same shall be attached to the judgment roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the Supreme Court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the Supreme Court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

An order of confirmation of the report of commissioners in a street opening proceeding is in the nature of a judgment, and cannot be attacked collaterally on non-jurisdictional grounds. *People ex rel. Dady v. Sup'rs*, 154 N. Y. 381, 48 N. E. 813.

The confirmation of an award is in the nature of a judgment, and the statutory limit thereof is twenty years from the date thereof. *Board of Supervisors of Erie Co. v. City of Buffalo*, 18 Supp. 635.

An award, made under chapter 140 of the Laws of 1850, as amended, in condemnation proceedings instituted by a railroad corporation, is in its nature and effect a judgment against the corporation for the payment of money, which, by the terms of the statute, may be enforced by an action at law or in equity.

Where it appears that a question as to the validity of certain taxes as liens upon the land condemned was necessarily involved and decided in the condemnation proceedings, the decision made therein cannot be questioned collaterally while those proceedings remain unreversed. *Cottle v. N. Y., W. S. & B. R. Co.*, 27 App. Div. 604, 50 Supp. 1008.

An order of confirmation of the report of the commissioners of appraisal is not repugnant to the constitutional provision prohibiting the taking of private property for public use without just compensation (Const. art. 1, § 6), because instead of directing the compensation for the land to be paid to the party claiming to be the owner, it directs the deposit thereof in

bank subject to the order of the court. The money, when deposited, becomes, in law, the property of the party entitled to it, and the intervention of the court may be necessary for the settlement of conflicting claims or for the adjustment of liens.

Whether the order directs the money to be drawn out on an *ex parte* application, or upon motion, does not affect its validity. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116.

It was held that an award by commissioners of estimate and assessment to acquire land for a street improvement in the city of New York under the Act of 1813, when confirmed by the Supreme Court, was final and conclusive both upon the city and the owner, that it was in the nature of a judgment and could not be assailed collaterally. *Matter of Department of Public Parks*, 73 N. Y. 560.

Where a report was made by commissioners which was confirmed by the Special Term, it was held that such determination as to the value of plaintiff's property interest was conclusive in action subsequently brought with reference to the property, it not having been set aside or reversed or the proceeding abandoned. That the fact that the order of confirmation had not been recorded did not affect its conclusive character. *Oberfelder v. Metropolitan El. R. R. Co.*, 138 N. Y. 181.

Where a corporation which was organized under the General Railroad Act and became possessed of the powers conferred by the Rapid Transit Act takes real property in condemnation proceedings, the two statutes must be read together to ascertain the extent of the fee to be taken, and as so read require the construction that the property condemned thereunder is not to be held in fee simple, but only for the uses and purposes of the corporation during the continuance of the corporate existence. *Hudson & Manhattan R. R. Co. v. Wendel*, 193 N. Y. 166, aff'g 122 App. Div. 917.

It is said (§ 216, *Mills on Eminent Domain*), that all elements of damages should be presented to the commissioners assessing the damages. The appraisement embraces all past, present, and future damages which the improvement may thereafter reasonably produce. But it is not to be assumed that a railroad will use unsafe appliances or perform a tortious act. *Mayor v. Bailey*, 2 Denio, 233.

An award for property along the river will exclude bulkhead rights. *Matter of Alexander Ave.*, 44 St. Rep. 546, 17 Supp. 933; *Langan v. The Mayor*, 59 Hun, 434, 37 St. Rep. 99, 13 Supp. 864. The restoration of a private road leading to docks upon a river is not the duty of a railroad company which has taken lands of the owner under the water, and the award must compensate him. *Kerr v. W. S. R. R. Co.*, 127 N. Y. 269, 37 St. Rep. 913.

The right of an owner of lands beneath waters to cut and harvest ice

is appurtenant to the ownership of the soil and must be deemed to have been included in the award made when the land itself was taken by eminent domain. *Matter of Daly*, 123 App. Div. 709, 108 Supp. 635; aff'd, 192 N. Y. 571.

On the condemnation of land in the city of New York for the purpose of opening streets, title does not pass to the city until the final confirmation of the report of the commissioners of estimate and assessment. *Matter of Mayor (Mount Vernon avenue)*, 127 App. Div. 650, 111 Supp. 895; aff'd, 193 N. Y. 658.

The owner's title is not divested until the proceedings are completed, nor is title acquired until confirmation of the report of the commissioners to assess damages. *Ryder v. Stryker*, 63 N. Y. 136, aff'g 2 Hun, 115, 4 Super. Ct. 399; *Matter of North 13th Street*, 5 Hun, 175; *Ballou v. Ballou*, 78 N. Y. 325.

On complying with the conditions precedent, as provided by the award, the Supreme Court has power to put the petitioner in possession of the property condemned. *Matter of Application of H. R. R. Co.*, 60 N. Y. 116.

An action to recover an award made in condemnation proceedings is one upon contract, in which the defendant may set up a counterclaim for damages for breach of a prior contract for the sale of the land at an agreed price. *Cottle v. N. Y., W. S. & B. R. R. Co.*, 27 App. Div. 604, 50 Supp. 1008, 84 St. Rep. 1008. An action against the city of Binghamton to recover the amount of an award in street opening proceedings which is commenced on the day on which a resolution directing payment of the award into court on account of adverse claims is signed by the mayor and the day before the payment into court is made is improperly brought, as there is no necessity therefor. *Patterson v. City of Binghamton*, 154 N. Y. 391, 48 N. E. 739, aff'g 4 App. Div. 615, 39 Supp. 408.

In a proceeding where there has been a trial, the appeal taken from an order granting the application, costs as in an action may be allowed under section 3240 of the Code. *Matter of Long*, 39 St. Rep. 892, 15 Supp. 657.

Under section 3240 costs of appeal to the court of record in a special proceeding, where not specially regulated by the Code, may be awarded in the discretion of the court at rates allowed for similar services in an action. A proceeding under the General Railroad Act is a special proceeding, and costs should be allowed in such proceeding the same as if in civil action. *Matter of South Market Street*, 80 Hun, 246.

An application for an order appointing commissioners to appraise the damages caused by an extension of a street is a special proceeding, and costs on an appeal therefrom may, in the discretion of the court, be awarded to either party at the rate allowed on an appeal from the judg-

ment in an action in the same court. *Matter of South Market Street*, 80 Hun, 246, 61 St. Rep. 626, 29 Supp. 1030.

Where a court has acquired jurisdiction such proceedings cannot be attacked collaterally. *Allen v. Utica, Ithaca & Elmira R. R. Co.*, 15 Hun, 80.

No right is vested in the company to the lands, or in the owner to the moneys, until the court has confirmed the report of the commissioners. *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689. When the order has been recorded and the money deposited, the title is wholly vested in the company, and no longer remains in the former owner, and the company cannot, by changing the route, avoid paying compensation on the ground the land is unnecessary. *Crowner v. Watertown, etc., R. R. Co.*, 9 How. 457, decided before the present provision as to abandonment of the proceeding embodied in this section. Upon the consummation of the proceedings prescribed by the act, all persons who have been made parties to the proceedings are divested and barred of their interest in such land, and have no longer a legal right to keep the company out of possession. *Niagara Falls, etc., R. R. Co. v. Hotchkiss*, 16 Barb. 270. Where land has been condemned, the landowner, after the payment and deposit of the award, loses all estate in the land. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12; *Matter of N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 287. The railroad company cannot acquire any greater right than that of the parties against whom they proceeded. *Anderson v. Rochester, etc., R. R. Co.*, 9 How. 553.

A railroad company, under the statute enabling it to acquire title to lands, does not acquire the same unqualified title and right of disposition to the real estate taken for the road which individuals have in their lands, but the title to the land being limited in its use for the purpose of the railroad, it is subject to the exercise of all those powers reserved to the Legislature to which the franchises of the corporation are subject. *Albany & Northern R. R. Co. v. Brownell*, 24 N. Y. 345. The title vested in the company is also subject to the duty on the part of the company to make and maintain suitable farm crossings, and the right of passage of the former owner over such crossings. *Wheeler v. Rochester, etc., R. R. Co.*, 12 Barb. 227. Title vests in the company only when it has fully performed and complied with the conditions precedent, and paid or deposited the compensation as required by law. *Bloodgood v. Mohawk R. R. Co.*, 18 Wend. 9; *Beekman v. Saratoga R. R. Co.*, 3 Paige, 45; *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 N. Y. 325.

Where lands are taken for public use under the power of eminent domain, upon payment of their value to the owner of the fee, the public acquires absolute title divested of the wife's inchoate right of dower. *Moore v. New York*, 8 N. Y. 110; *Rexford v. Knight*, 15 Barb. 627.

Where private property is taken for public purposes on payment of a just compensation, there is no reversionary estate in the representatives of the original owner, and the property so acquired may be converted to other purposes. *Heyward v. N. Y.*, 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308. When the State or a municipal corporation has acquired the absolute title to land for public use, which use has been discontinued, the title does not revert, but may be granted to individuals for private purposes. *Birdsall v. Carey*, 66 How. 358. Although an appropriation for conveyance of land be for public use, and it be so expressed in the law authorizing the appropriation, or in the deed, this does not prevent the passage of the absolute title, so as to cut off all right of revision to the former owner or the grantor. *Tift v. City of Buffalo*, 82 N. Y. 204. Reversion of the land is never contemplated in the assessment of damages for lands taken by a corporation; it is regarded as permanent and the damages are awarded on that basis. *Minor v. N. Y. C. & H. R. R. R. Co.*, 123 N. Y. 342, aff'g 46 Hun, 612.

Where the amount awarded on a final order in condemnation proceedings has been tendered to the owner whose lands are taken, and on his refusal to accept it has been deposited with the county treasurer by the condemnor to the credit of the owner pursuant to section 3371 of the Code of Civil Procedure, the deposit is deemed a payment within the provisions of the act, and the owner is not entitled to interest during the period covered by an appeal from the award.

He is, however, entitled to any earnings of the money while in the hands of the county treasurer, and also to interest on any additional award secured by the appeal, to be computed from the time when the condemnor entered into possession of the lands. So, too, he is entitled to an additional allowance of costs where the award was increased as a result of the appeal.

By virtue of section 3375 of the Code of Civil Procedure, an appeal from an award does not disturb the condemnor's possession, and hence, where he has deposited the amount of the award pursuant to said section 3371, the money remains the property of the condemnee, and his rights thereto are not jeopardized by his appeal. *Matter of Bd. of Water Com'rs*, 132 App. Div. 75, 116 Supp. 495; aff'd, 195 N. Y. 502.

ARTICLE XI.

ABANDONMENT AND DISCONTINUANCE OF PROCEEDING. § 3374.

§ 3374. Abandonment and discontinuance of proceeding.

Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight days' notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commission-

ers, and the costs and expenses directed to be paid in such final order, if such final order shall have been entered, and upon such other terms and conditions as the court may prescribe; and upon the entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceeding be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

The proceeding may be discontinued at any time before confirmation; up to that time there is no obligation to take the land imposed upon the company. *Matter of Syracuse, etc., R. R. Co.*, 4 Hun, 311; *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689. After confirmation the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner upon confirmation of the report, mutual rights have vested in the parties, and the corporation cannot of its own option recede. It is not necessary in order to conclude the corporation that the title to the land should have vested in it under the proceedings; it is sufficient if the right to acquire it in payment of the award is fixed. Where the railroad company is required to file the papers after an award on motion, they were ordered so to do. *Matter of Rhinebeck & Conn. R. R. Co.*, 67 N. Y. 242. Where proceedings are sought to be discontinued after report and before confirmation, it is within the legitimate power of the court in granting the application to annex such terms to go with the favor as justice and fairness require, and the court is not restricted to costs and disbursements as a condition, but may in its discretion impose payment of an allowance. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. N. S. 190.

The right to discontinue condemnation proceedings is not absolute and should not be allowed on the motion of the condemnor made long after the report of the commissioners has been confirmed except for the gravest reasons. *N. Y. C. & H. R. R. Co. v. Marshall*, 127 App. Div. 534, 112 Supp. 33.

Condemnation proceedings instituted by a city may be discontinued as to a part of the property proposed to be taken, where it was unable to acquire the whole and a portion that they could acquire would by reason thereof be of no use for the purpose sought, without abandoning the proceedings *in toto*. *Matter of Mayor, etc., of N. Y.*, 52 Misc. 319, 102 Supp. 159; *rev'd*, 127 App. Div. 650, 111 Supp. 895; *aff'd*, 193 N. Y. 658.

Where a county discontinues its proceeding to condemn lands for a site for a new courthouse before commissioners have been appointed to ascertain the compensation to be made to owners of the property taken there-

for, the court can impose upon the county only the taxable costs of the parties who appeared, the costs of motions, and the compensation of an infant defendant's guardian *ad litem*. *Co. of Onondaga v. White*, 38 Misc. 587, 77 Supp. 1074.

The phrase in Code of Civil Procedure, section 3374, relative to a discontinuance, "and upon such other terms and conditions as the court may prescribe," does not authorize it to compensate parties who, while the proceeding was pending during a period of three months, incurred counsel fees and expenses, lost tenants and rents, and in some cases hired other property in expectation of being compelled by the county to vacate their own. *Co. of Onondaga v. White*, 38 Misc. 587, 77 Supp. 1074.

The city of New York may discontinue condemnation proceedings at any time before the report of the commissioners is finally confirmed. *Matter of Bd. of Education of N. Y.*, 59 App. Div. 258, 69 Supp. 572; rev'd, 169 N. Y. 456.

The costs on an application for "an abandonment and discontinuance of the proceedings" are regulated by section 3374 of the Code of Civil Procedure. *Matter of Village of Le Roy*, 35 App. Div. 177.

Condemnation proceedings instituted under chapter 320 of the Laws of 1887, as amended by chapter 69 of the Laws of 1895, by a resolution of the board of street opening and improvement to establish a public park in the city of New York may, while pending before the commissioners and before they have finished taking testimony as to value, be discontinued by a resolution of the board of public improvement under section 1000 of chapter 378 of the Laws of 1897, although the proceedings were instituted before the passage of the latter act, as such section relates merely to the method of procedure, which the Legislature has power to change, even though the change affects pending actions or proceedings.

On such discontinuance the court has not power to dismiss the proceeding "with costs as in an action." *Matter of the Mayor*, 34 App. Div. 468.

The trustees of a village may, by resolution, discontinue proceedings for the extension of a street, but cannot subsequently restore such proceedings by rescinding such resolution, as against interested persons who, in the meantime, have acquired new rights by legislative enactment. *Matter of Folts Street*, 29 App. Div. 69; *sub nom. Village of Herkimer v. N. Y. C. & H. R. R. R. Co.*, 51 N. Y. Supp. 390, 85 St. Rep. 390. The trustees of a village have no power, by resolution, to discontinue a special proceeding for the extension of a street while an appeal is pending therein, without consent of the opposite parties and leave of the court; and such resolution has no effect upon such appeal. *Matter of Folts Street*, 29 App. Div. 69; *sub nom. Village of Herkimer v. N. Y. C. & H. R. R. R. Co.*, 51 N. Y. Supp. 390, 85 St. Rep. 390.

It was held in *People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56, that where proceedings, by a municipal corporation, to condemn lands for public purposes have so far progressed that the amount of compensation to be paid to the owner has been fixed as a finality, the proceedings cannot be discontinued and abandoned by the municipal authorities; the owner has a vested right to the compensation, and payment may be enforced according to the statute under which the proceedings were instituted. This right may precede the vesting of the title in the corporation.

A property-owner acquires no vested rights in an award, made for property condemned in a proceeding for opening a new street in a city, until the final confirmation of the report of the commissioners of appraisal, and a municipal corporation may be permitted to discontinue proceedings to take property for public purposes at any time before rights, resulting therefrom, have become vested in the property-owner. *Schneider v. City of Rochester*, 90 Hun, 171, 35 Supp. 786; *dism'd*, 155 N. Y. 619.

It was held that in proceedings to condemn land under the General Railroad Act there was no obligation imposed on the company to take land until the confirmation of the report of the commissioners appointed to assess the damages. That up to that point in the proceedings the court had power on application of the company to discontinue the proceedings, following *Rensselaer, etc., R. R. Co. v. Davis*, 55 N. Y. 145. *Matter of Application, Syracuse & Binghamton R. R. Co.*, 4 Hun, 311.

Proceedings taken by public officers for the condemnation of lands for public use may be abandoned at any time before the confirmation of the report of commissioners of appraisal.

The property-owners acquire no vested rights in the condemnation proceedings until the report of the commissioners of appraisal is finally confirmed. *Simpson v. Berkowitz*, 59 Misc. 160.

ARTICLE XII.

MISCELLANEOUS PROVISIONS AND MATTERS OF PRACTICE. §§ 3368, 3382, 3383, 3384.

Subd. 1. General provisions as to practice, 608.

Subd. 2. Power of amendment and right to make orders, 614.

§ 3368. *Certain provisions applicable*, 614.

§ 3382. *Power of court to make necessary orders*, 614.

Subd. 3. Objections when to be raised; what constitutes laches, 615.

Subd. 4. Repealing clause and when act takes effect, 617.

§ 3383. *Repealing clause; limitations*, 617.

§ 3384. *When act takes effect*, 617.

Subd. 1. General Provisions as to Practice.

Proceedings for the condemnation of land under the Condemnation Law (Code Civ. Pro., § 3357 *et seq.*) must be taken in court;

a judge out of court has no power in respect thereto. *Matter of Broadway and 7th Ave. R. R. Co.*, 73 Hun, 7. While it is more convenient and less expensive to include all lands and owners in one proceeding, it is not necessary; separate applications may be made to the court as to each. *City of Johnstown v. Wade*, 30 App. Div. 5, 51 N. Y. Supp. 763, 85 St. Rep. 763. If the Legislature requires resort to the agency of a court of record to determine the compensation to be made for the taking of lands, it must designate a court, which, with respect to the subject-matters and persons, is competent as possessing local jurisdiction over them. *Matter of City of Buffalo*, 139 N. Y. 422, 54 St. Rep. 692, aff'g 46 St. Rep. 81, 18 Supp. 771.

Where lands were taken under a special statute, it was held that that statute was intended to secure the attendance of some fit person before the tribunal making the appointment, as guardian or attorney to attend personally to the interests of the infant, and that without such appearance the proceedings in that case were entirely unauthorized and void, and that until such appearance jurisdiction was not acquired. *Hotchkiss v. Auburn, etc., R. R. Co.*, 36 Barb. 600.

One who has, or claims to have, an interest in the lands sought to be acquired, if not named in the petition, has a right to be made a party of the proceedings on timely application to the court, supported by affidavits, which, if true, show him to be a party in interest; the allegations in the affidavit must be tried by legal evidence and not by counter-affidavit, and the court has no right to impose a condition upon an applicant who makes out a *prima facie* case. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 194.

In a proceeding for the opening of a street in the city of New York was held in *Matter of 163d St.*, 61 Hun 365; appeal dism'd, 131 N. Y. 569, to be a special proceeding and not an action and that a final judgment is a conclusive adjudication upon the rights of all persons interested.

Where a petition is duly presented, but no sufficient cause of opposition is shown, it is the duty of the court to appoint commissioners to estimate the compensation; judicial action upon the law and facts being taken upon the coming in of their report. *Matter of Southern Boulevard Rd. Co.*, 146 N. Y. 352, 69 St. Rep. 183.

In proceedings upon petition by a railroad company to take a designated piece of upland along the river bank, the objection that the petitioner intends to build an embankment across a bay cutting off a dock from the river is not presented. The remedy is at law or in equity. *Matter of N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685.

Upon a motion to dismiss the petition in a condemnation proceeding, at the close of the plaintiff's case, it is entitled to the benefit of every fact

that can be found from the evidence and to all reasonable inferences warranted thereby. *Village of Babylon v. Bergen*, 68 Misc. 433.

A proceeding by a water company to acquire land, brought under section 83 of the Transportation Corporations Law, must be dismissed on failure to prove the filing of the survey and map required by the section. *Matter of Citizens' Water-Works Co.*, 32 App. Div. 54, 52 Supp. 473, 86 St. Rep. 473.

If the petition does not show the facts required by statute to be stated, the objection may be disposed of before trial. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217.

The court may appoint commissioners to appraise all the lands proposed to be taken in a county, although owned by different parties. The statute authorized a joint commission, comprehending all the landowners included in one petition, and there is nothing in the statute to prevent several owners being included in one petition. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238.

The omission from the constitutional oath required to be taken by the commissioners of the word "faithfully" is sufficient to invalidate the proceeding, unless the parties can be held to have waived the objection by going on without calling attention to the defect until the report was made. *Matter of Gilroy*, 85 Hun, 424, 32 Supp. 891.

By proceeding with the matter, a party waives any objection to the validity of the proceedings in a street opening which he might have, and which he should have made when the commissioners were appointed. *Matter of Lexington Ave. Ry. Co.*, 44 St. Rep. 307, 17 Supp. 870.

A party who has, by putting in a general appearance and proceeded without objection, submitted himself to the jurisdiction of the court, cannot afterward raise objection to the sufficiency of the verification to the petition. *Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148.

Where proceedings were instituted to acquire lands and were resisted on the grounds that the petitioner was not incorporated for a public purpose, and so, therefore, incapable of exercising the right of eminent domain, and the objection was oral, and both parties consented to the appointment of commissioners, and an order to that effect was entered and no appeal taken, and subsequently it was decided by the Court of Appeals that the lands sought to be acquired were not for a public use, and that the petitioner had no power to acquire title by condemnation, it was held that the want of the power in the petitioner constituted an original jurisdictional defect to the order, and that the landowner had not waived the right to move to set aside the order appointing commissioners. *Matter of N. F. & W. R. Co.*, 121 N. Y. 319.

The entire damages to be paid the owners of land sought to be condemned should be ascertained in a single proceeding. *Matter of Lake Shore & M. S. R. Co.*, 53 Misc. 340, 103 Supp. 294.

A party whose land is taken who claims damages therefor has the right to the opening and closing argument in the proceeding. *Matter of N. Y., Lackawanna, etc., Rd. Co.* 33 Hun, 148.

Occupants served with notice may defend against condemnation proceedings because of the failure to serve all the owners. *Greenwich & J. R. Co. v. Greenwich & S. El. R. Co.*, 75 App. Div. 220, 78 Supp. 24; aff'd, 172 N. Y. 462.

Objections raised to the sufficiency of the notice of the presentation of the petition in a proceeding for condemnation are not waived by the mere fact that a demurrer to the petition is subsequently interposed. *Matter of B'dway & 7th Ave. R. R. Co.*, 69 Hun, 275, 23 Supp. 609.

Property owners who, although personally served with a petition and notice in proceedings taken under the Condemnation Law of the Code of Civil Procedure by an elevated railroad to condemn street easements, never appeared in the proceedings, are not entitled to notice of any subsequent proceedings. *Matter of Brooklyn Elevated R. R. Co.*, 25 Misc. 120.

A motion to reopen the case, made to the commissioners after the condemnation proceedings had been closed and before they reported, is addressed to their discretion, with the exercise of which the court will not interfere unless the same has been abused. *Matter of Simmons*, 58 Misc. 581.

In a proceeding for the assessment of the damages of riparian owners on a stream made a public highway, a number of the defendants did not answer, judgment was taken against them, and thereafter an order of discontinuance was entered as to those answering. *Held* that in a new proceeding against the latter, the defendants against whom judgment had been taken by default need not be joined as parties. *Matter of Wilder*, 90 App. Div. 262, 85 Supp. 741.

A finding that the defendant is the owner of the premises instead of owning a mere easement therein, as alleged in the petition does not require a dismissal of the proceeding, and the petitioner should be allowed to continue it for the purpose of acquiring all the defendant's title even if it became necessary to amend some of the allegations of the petition. *City of Geneva v. Henson*, 195 N. Y. 447, rev'g 121 App. Div. 893, 105 Supp. 1110.

The report of the first commissioners appointed to estimate damages on taking property for a street in the city of New York having been rejected, and new commissioners appointed to reconsider the report and revise it or make a new one, *held* that they should have considered all the evidence presented by the property-owners concerned before the former commissioners. *Matter of Amsterdam Avenue (129th and 130th streets)*, 53 Misc. 342, 104 Supp. 821.

Until the report of commissioners in condemnation proceedings has been

filed or otherwise placed beyond their control, it does not become conclusive upon them, and the facts that one of the commissioners had announced the amount of the award, and that two of them had signed the report, does not constitute a decision beyond the power of recall. *People ex rel. Comstock v. Morrison*, 54 App. Div. 262, 66 Supp. 519; aff'd, without opinion, 165 N. Y. 644.

Commissioners of estimate and apportionment of the city of New York may, but are not required to, allow landowners affected by the proceeding to produce further testimony as to the value of their property at the time fixed by the commissioners for the hearing of objections to their abstract of estimate.

Such commissioners have a right to act upon information derived in part from a personal view of the premises. *Matter of City of N. Y.*, 33 Misc. 648, 68 Supp. 965.

In condemnation proceedings, an order, made after an appeal confirming a report of the commissioners of appraisal to determine the compensation, was not conclusive on persons not parties to the appeal nor to the subsequent proceedings. *Cochrane v. Smadbeck*, 99 Supp. 5.

The Supreme Court has power to vacate an order confirming the report of commissioners of appraisal, and thereupon to set aside the report and to appoint new commissioners. The owner is not confined to the remedy by appeal to the General Term given by the Railroad Act. Where cause is shown for setting aside the proceedings, the court is the judge of sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in the Court of Appeals. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

An order confirming the report of commissioners of estimate and assessment relative to the opening of a street, being a judgment of the court, may be modified to correct a mistake of the commissioners, in failing to make an award for land taken for such street; but, on opening the proceedings, upon the application of the owner of such land, a stipulation may be required from such owner to claim only the value of the land at the time of the original assessment, and not its subsequent increased value. *In re Opening of 181st St.*, 12 Supp. 345.

In *Matter of 163d St.*, 61 Hun, 365; appeal dism'd, 131 N. Y. 569, it was held that the court had power to relieve from his default one who had filed objections to a report in condemnation proceedings one day too late, since section 724 gives the court power to relieve a party in default through mistake, inadvertence, surprise, or excusable neglect, and this section is applicable to said case.

Where, upon an appeal from an order confirming the report of commissioners, appointed to appraise the damages to be occasioned by the taking of land for the purpose of a railroad, the respondent claims that

the minutes of the testimony annexed to the report are defective, in that certain admissions made by the appellant's counsel are omitted therefrom and moves to have the said minutes corrected, the court should, in the absence of all claims of bad faith or culpable irregularity upon the part of the commissioners, refuse to determine the question and should allow an application to be made to the commissioners upon proper notice to have the minutes corrected so as to conform to the facts, and when so corrected to be filed *nunc pro tunc*. *Matter of N. Y., W. S. & B. R. Co.*, 33 Hun, 293.

Where commissioners were appointed and made a report which was reversed on appeal by the General Term, and that decision affirmed by the Court of Appeals, the matter was sent back to the same commissioners, the appellate court holding they had no power to appoint other commissioners than those named in the agreement made between the owner and the company, it was held that the court, on motion pending the second hearing, could vacate the order appointing the persons named to act as commissioners, upon the ground of misconduct. The court was not required to send the petitioner to a court of equity to obtain a decree. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 40 Hun, 130.

Although section 3367 of the Code of Civil Procedure does not authorize a question of title to be tried before a referee appointed in condemnation proceedings, the issue may be so tried on stipulation of the parties. *City of Geneva v. Henson*, 140 App. Div. 49.

Where the court refuses to confirm the report of commissioners of estimate and assessment on the condemnation of lands for sewage purposes in the city of New York on the ground that the award is too large, new commissioners should be appointed. If the refusal to confirm the award be affirmed by the Appellate Division the order should be modified by appointing new commissioners instead of sending the report back to the original commissioners.

Commissioners in such condemnation proceeding should base the award upon the present market value of the premises, not upon its future market value. *Matter of Collis*, 144 App. Div. 382.

Where after the three commissioners appointed in condemnation proceedings to appraise the damages caused by the taking of land for railroad purposes had viewed the premises and pending a hearing to take the testimony one commissioner died, the surviving commissioners, under section 3370 of the Code and section 41 of the General Construction Law, have ample power to continue the work of the commission.

There is no power specified in the Condemnation Law for the appointment of a successor to a deceased commissioner of appraisal. *L. S. & M. S. R. R. Co. v. Mahle*, 72 Misc. 129.

An agreement by a landowner employing a corporation to appear in con-

demnation proceedings and "to furnish such legal and other expert services as it may deem necessary," in consideration of a promise to pay the corporation one-third of the sum allowed on condemnation is illegal, void, and unenforceable by the corporation, not only because the corporation is retained to render legal services, but also because it gives to the corporation a portion of the recovery for furnishing expert witnesses.

As such corporation has no interest in the award by virtue of said contract, it is a stranger to a summary motion made by the landowner to compel the comptroller to deliver a warrant for the payment of the award and cannot object to the summary disposition of the matter on motion where the condemnor makes no objection. *Matter of City of N. Y. (Avenue A, etc.)*, 144 App. Div. 107.

Subd. 2. Power of Amendment and Right to Make Orders.

§§ 3368, 3382.

§ 3368. Certain provisions applicable.

The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.

§ 3382. Power of court to make necessary orders.

In proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Chapter 8 is entitled "Miscellaneous Interlocutory Proceedings and Regulations of Practice." Title 1 of that chapter, sections 721-730, relates to "Mistakes, omissions, defects, and irregularities."

Under section 723 of the Code of Civil Procedure, made applicable to condemnation proceedings by section 3368, the court after judgment by default may allow an amendment of the petition and judgment correcting a clerical error in the description of the property condemned. *Brooklyn Union El. R. R. Co. v. Valance*, 123 App. Div. 687.

A park is a "public place" within the meaning of the repealing clause contained in the Condemnation Law (Code Civ. Pro., chap. 23, tit. 1), which excepts from the operation of such repealing clause (Code Civ. Pro., § 3383) "such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway or as a street, avenue or public place in an incorporated city or village." *Matter of City of Rochester (In re McLean)*, 102 App. Div. 181.

A failure to appoint commissioners, in a judgment rendered in proceedings for the condemnation of real property, as contemplated by section 3369 of the Code of Civil Procedure, may be supplied by the court, under the authority conferred by section 724 of that Code. *Manhattan Ry. Co. v. Stroub*, 68 Hun, 90.

Where, upon a hearing before commissioners, the owner makes default, the Supreme Court has power, on motion to confirm the report of the commissioners, the default being excused, to open it, set aside the report, and order a new hearing. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 93 N. Y. 385, aff'g 29 Hun, 602.

Subd. 3. Objections, When to be Raised; What Constitutes Laches.

Where the one whose land had been taken by commissioners in opening a street failed to file objections to their award within the time fixed by statute, and no sufficient excuse was given for such failure, and the report had been confirmed and the assessments have been made, the report will not be recommitted for amendment as to such award. *In re Lexington Ave.*, 18 Supp. 828.

A landowner who has failed to appear before commissioners in condemnation proceedings instituted by a railroad company, after having had repeated notices from both the commissioners and the attorneys for the railroad company that the commissioners would proceed to fix his damages in his absence if he failed to appear, is not entitled to have his default opened, and an award of the commissioners set aside, made on proof before them that in the forenoon of that day the counsel for the railroad company gave the counsel for the landowner notice that the matter had been adjourned until the afternoon, and that the company would then proceed with its proof, and that counsel for the landowner made no reply. *In re Metropolitan Ry. Co.*, 25 Supp. 399.

An objection that one of the commissioners was appointed *ex parte* and that such appointment was a nullity cannot be raised after the report of the commissioners has been confirmed by a competent tribunal. *Morris v. Mayor*, 55 Hun, 476.

An objection to the qualifications of one of the commissioners cannot be raised for the first time on the application for the confirmation of his report. *Matter of City of New York (Avenue A)*, 66 Misc. 488.

In proceedings to condemn land for storage reservoirs for an aqueduct for a city, no objection was made that the acts of the Legislature authorizing the taking of property for the purpose did not cover the land in question. *Held*, that such objection could not be set up in an action by the city for possession of land so condemned. *Mayor, etc., of the City of New York v. Wright*, 12 Supp. 20.

An order denying a motion by a landowner for leave to file objections to the report of commissioners made seven months after the time had expired will not be disturbed where the ground of denial does not appear, but it appears that the landowner had the advice of counsel and knew of the proceedings in time to have appeared before the commissioners. *In re Lexington Ave.*, 16 Supp. 113.

Where owners of property, condemned for St. Nicholas park, New York city, under Laws of 1894, chapter 366, providing that title shall not vest in the city until the report of the commissioners is confirmed, file objections thereto upon the ground that they have not been awarded thereby just compensation, and two years elapse, after confirmation of the report as to all parties except them, without any action upon the part of the city to procure confirmation as to them, and they remain in possession in the meantime, they have not been guilty of *laches* and are entitled to an order requiring the commissioners to make a supplemental report awarding them compensation under the rule laid down in *Matter of Mayor*, 40 App. Div. 281, and *Matter of Riverside Park*, 59 App. Div. 603; *aff'd*, 167 N. Y. 627.

Upon an application to set aside an award, it was alleged that one of the commissioners was not legally appointed and had no jurisdiction to act; it was held too late to raise this objection after the confirmation of the commissioners' report. *Matter of Astor*, 62 N. Y. 580.

Where commissioners were appointed to assess the damages to property-owners resulting from the closing of a street for railroad depot purposes, the regularity and validity of their proceedings, not involving the jurisdiction of the court or the commissioners, cannot be attacked originally in a collateral proceeding to recover damages for injury to plaintiff's property consequent on the closure. *Weinckie v. N. Y. C. & H. R. R. Co.*, 15 Supp. 689.

The owner of lands sought to be acquired joined in the proceedings by petition asking for the appointment of a person named as one of the commissioners who was appointed. The commissioners executed their office, appraising the lands of the owner, who joined in the proceeding. He thereupon moved to set aside the order appointing the commissioners because of the alleged unconstitutionality of said act and of non-compliance of the moving party to certain statutory conditions; *held*, that such petitioner was estopped from raising these questions. *Matter of Cooper*, 93 N. Y. 507. But where the owner objects to the appointment of commissioners on the ground that the land was sought for private purposes, his failure to appeal from a decision that the purpose was public and consent to the appointment of commissioners did not amount to a waiver of his rights and he may thereafter move to set the order aside. *In re Niagara Falls & W. Ry. Co.*, 4 Supp. 485.

Commissioners appointed under section 159 of the Village Law (L. 1897, chap. 414) to determine the compensation to be paid to a person who has filed a claim for damages to his premises resulting from a change of grade, have no power to entertain a motion to dismiss the proceeding upon the ground that the claimant failed to comply with a statute requiring that such claim be filed within a specified time, nor can such juris-

diction be conferred upon the commissioners by a stipulation entered into between the attorneys for the claimant and the village.

Such question should be raised upon the motion for the appointment of the commissioners.

The question of the commissioners' lack of jurisdiction may be raised for the first time in the Appellate Division on an appeal thereto from an order confirming the commissioners' report. *Matter of Caffrey*, 52 App. Div. 264, 65 Supp. 470.

A lessee of real property condemned under the Rapid Transit Act should be allowed to amend his claim *nunc pro tunc* so as to claim the value of trade fixtures installed by him on the premises and which he would be entitled to remove, as against his landlord, although section 55 of the Rapid Transit Act requires claims for compensation to be made within six months after the appointment of commissioners of appraisal, and that period has expired. *Matter of Willcox*, 142 App. Div. 680.

Subd. 4. Repealing Clause and When Act Takes Effect.

§§ 3383, 3384.

§ 3383. Repealing clause; limitations.

So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and part of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New York, known as the mayor, aldermen, and commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners, or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

§ 3384. When act takes effect.

This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

ARTICLE XIII.

APPEAL AND NEW APPRAISAL. §§ 3375, 3376, 3377.

Subd. 1. Appeal to Appellate Division, 617.

§ 3375. *Appeal from final orders; stay*, 617.

§ 3376. *Appeal from judgment by plaintiff*, 618.

Subd. 2. Appeal to Court of Appeals, 624.

Subd. 3. New appraisal, 627.

§ 3377. *When Appellate Division may direct a new appraisal*, 627.

Subd. 1. Appeal to Appellate Division. §§ 3375, 3376.

§ 3375. Appeal from final orders; stay.

Appeals may be taken to the appellate division of the Supreme Court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act, and all the provisions of such chapter relating to appeals to the appellate division of the Supreme Court from orders of the Special Term shall apply

to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled, and allowed, as required by the provisions of this act, for the review of the trial of actions in the Supreme Court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

§ 3376. Appeal from judgment by plaintiff.

If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the appellate division of the Supreme Court within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of said chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the appellate division may affirm, reverse, or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

An appeal lies to the General Term from the order of the Special Term, confirming the report of commissioners. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187.

An appeal may be taken from an order appointing commissioners in condemnation proceedings. *Matter of B'dway & 7th Ave. R. R. Co.*, 69 Hun, 275, 53 St. Rep. 38, 23 Supp. 609. So an appeal may be taken from an order denying the motion for the appointment of commissioners. *Matter of Metropolitan Elevated R. R. Co.*, 136 N. Y. 500, 49 St. Rep. 648, rev'g 49 St. Rep. 374, 20 Supp. 818. So an order appointing commissioners to condemn lands already appropriated to public use is appealable. *Matter of City of Utica*, 73 Hun, 256, 58 St. Rep. 80, 26 Supp. 564.

Where an order was made overruling preliminary objections interposed by property-owners to the petition, which objections were jurisdictional, such order was held to be appealable, although the Condemnation Law contains no definite warrant for an appeal from such preliminary order. This, however, is said to be sustained by the weight of authority and by principle, citing numerous authorities. The court further says in *Matter of City of Rochester*, 102 App. Div. 99, 101, that the only specific authority for the appeal is found in section 3375, which permits an appeal from a final order and allows the antecedent proceedings to be reviewed upon appeal; that, following strictly this provision, it has been held that an appeal from an interlocutory judgment appointing commissioners to appraise lands in a proceeding of this character is not permissible, citing *Erie Railroad Co. v. Steward*, 59 App. Div. 187; *Village of St. Johnsville v. Smith*, 61 App. Div. 380; *Stillwater, etc., R. Co. v. B. & M. R.*

Co., 67 App. Div. 367. The court holds, however, that these authorities are not necessarily in conflict with the principle enunciated and that when the proceeding has reached the status of a judgment appointing commissioners the preliminary stages have been passed and an appeal may well be deferred, but that where the objections are jurisdictional in alleging that the petition omitted certain essential facts and are introduced at the threshold of the proceeding they are and ought to be determined before the expense and delay of a protracted hearing which possibly may be obviated.

In *Matter of Commissioner of Public Works*, 185 N. Y. 391, it was held that an order of the Special Term denying a motion to confirm report of commissioners in a proceeding to acquire title to lands and returning the report for amendment and correction was not appealable to the Appellate Division. That the authority of that court to entertain appeals from orders made upon the coming in of reports of commissioners exists only when there has been an order of confirmation in whole or in part. *Aff'd* 111 App. Div. 285, *dist'g Matter of the City of N. Y.*, 182 N. Y. 281; *Real Estate Corporation v. Harper*, 174 N. Y. 123, upon the ground that those cases related to orders of partial confirmation, but had no application to the case where the order wholly denied the motion to confirm the report, so held under the language of the charter of the city of New York.

Private property may only be condemned for public use, and an owner whose property is to be taken by a proposed railroad may review by certiorari the order of the Railroad Commission permitting its construction. *People ex rel. Potter v. Bd. of R. R. Com'rs*, 124 App. Div. 47, 108 Supp. 288; *aff'd*, 192 N. Y. 573.

In reviewing an order of the Special Term appointing commissioners to appraise damages upon the application of a railroad company, it is the duty of the General Term to examine the evidence and determine whether the petitioner has fairly made out a case establishing that the premises are necessary for its use. Where, however, the necessity is shown to exist, and it is shown that the company has acted in good faith and exercised a reasonable discretion, the court will not interfere. *Matter of N. Y., L. & W. R. R. Co.*, 35 Hun, 220; *aff'd*, 99 N. Y. 12.

By force of section 3375 of the Code of Civil Procedure the right of a defendant in proceedings for the condemnation of real property to a stay of the plaintiff's proceedings, pending an appeal taken by the defendant to the General Term, is not an absolute one, but the decision of the question as to whether the stay shall be granted or refused rests in the discretion of the court, and must be determined by the circumstances of each case. *Manhattan Ry. Co. v. Stroub*, 70 Hun, 363.

Upon an appeal from an order confirming the report of the commis-

sioners, taken upon the alleged ground that the commissioners did not consider one element of damages, the Appellate Division, being of the opinion that it did not clearly appear from the record whether the commissioners did consider that element of damages in question, concluded to remit the report to the commissioners with directions to incorporate therein a statement of the grounds of their decision. *Matter of Bd. of Public Improvements*, 99 App. Div. 576.

The defendants in a condemnation proceeding cannot appeal from the interlocutory judgment authorizing the condemnation of the property sought to be acquired, but may, under section 3375 of the Code of Civil Procedure, review such judgment on an appeal taken from the order confirming the report of the commissioners appointed to ascertain the compensation to be paid by the plaintiff. *Village of St. Johnsville v. Smith*, 61 App. Div. 380, 77 Supp. 880.

In *Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571, the authorities, upon the power of the appellate court to review the order of the Special Term setting aside the report of commissioners in condemnation proceedings, are collated and discussed, and the conclusion reached that such an order was appealable, notwithstanding the peculiar provisions of sections 3371 and 3375 of the Code of Civil Procedure. The power of the court was deemed to be inherent to review, where a substantial right has been invaded, although not specially conferred by the Condemnation Law. This decision was subsequently affirmed by the Court of Appeals on the opinion of the court below. *Aff'd*, 150 N. Y. 569, and followed, *Matter of Town of Guilford*, 85 App. Div. 207.

An order made at Special Term, setting aside the report of commissioners of appraisal appointed in a condemnation proceeding, and ordering a rehearing before the same commissioners unless the defendants would stipulate to reduce the award, is appealable to the Appellate Division notwithstanding the peculiar provisions of sections 3371 and 3375 of the Code of Civil Procedure. *Matter of Town of Guilford*, 85 App. Div. 207.

The defendants in a condemnation proceeding, instituted under the Condemnation Law (Code Civ. Pro. §§ 3357-3384), cannot appeal from a judgment condemning the property entered in favor of the plaintiff, pursuant to the provisions of section 3369 of the Code of Civil Procedure; they can review such judgment only by appealing from the final order, as provided by section 3375. *Erie R. R. Co. v. Steward*, 59 App. Div. 187, 69 Supp. 57.

Where a motion for confirmation of the report was denied, and the matter sent to new commissioners to ascertain the damages, the order is appealable. *Matter of Manhattan Ry. Co. v. Stuyvesant*, 126 App. Div. 848, citing *Manhattan Ry. Co. v. O'Sullivan*, 6 App. Div. 571; *aff'd* on opinion below, 150 N. Y. 569.

An appeal lies from an order appointing commissioners. *Matter of B'way & 7th Ave. Co.*, 69 Hun, 275; *Matter of City of Utica*, 73 Hun, 256; *Hooker v. City of Rochester*, 57 App. Div. 530; *Matter of City of Buffalo*, 64 N. Y. 547.

A party claiming to be injured by the taking of property under condemnation proceedings presented a proposed answer which he was to be permitted to serve in case his objections to the proceedings were disallowed and the order referred the issue thus raised to a referee to hear and determine. It was held that an appeal would lie from the order; that although there is no definite warrant for an appeal from a preliminary order the general rule applicable to special proceedings should pertain. *Matter of City of Rochester*, 102 App. Div. 99.

The rule which deprives a party of the right to appeal from an order or judgment under which he has taken a benefit is not applicable to these proceedings, and the right to appeal is not affected by accepting payment for the land and giving a receipt therefor. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. Where a report of damages is set aside and new proceedings are instituted, in which the company deposits a sum of money in court to secure any award that may be made, and upon confirmation of a second award pays the damages and takes possession, this does not bar the right of appeal. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646.

Where a railroad corporation makes application to acquire title to uplands on the bank of a river, it is no objection, on appeal from order confirming report of commissions awarding damages, that the company proposed to build an embankment in front of the owner's premises, cutting his pier off from the river; if his rights have been interfered with, his remedy is by action, not by appeal. *In re N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685.

The Appellate Division has power to send back the report of commissioners of appraisal in condemnation proceedings, for the commissioners to state the grounds of their decision, and the rule adopted by them, so far as any evidence was before them concerning the value of any corporate franchise of the water company whose property was taken for public use. *Matter of Water Com'rs of White Plains*, 55 App. Div. 77, 66 Supp. 1005.

The duty of the Appellate Division, in the premises, is similar to that of the Special Term, for the reason that both courts are called upon to act in a discretionary manner, and where the award of commissioners is set aside by the Special Term as excessive, the Appellate Division has an inherent power to review the order. *Manhattan R. Co. v. O'Sullivan*, 6 App. Div. 571, 40 Supp. 326; aff'd, 150 N. Y. 569.

Under section 12 of the Railroad Law (L. 1890, chap. 565) which

provides that if two railroad corporations cannot agree upon the amount of compensation for making intersections or connections, etc., "the same shall be ascertained and determined by commissioners . . . as is provided in the Condemnation Law," the defendant railroad company cannot appeal from an order appointing commissioners, as under the Condemnation Law, the defendant can appeal only from a final order in the proceedings. *Stillwater, etc., R. R. Co. v. B. & M. R. R. Co.*, 67 App. Div. 367, 73 Supp. 744; *dism'd*, 170 N. Y. 573.

An order remitting to new commissioners the assessment of damages caused by the condemnation of easements of light and air taken on the construction of a stairway to an elevated railroad is appealable. *Matter of Manhattan Ry. Co. v. Stuyvesant*, 126 App. Div. 848, 111 Supp. 222.

An order sending back a report of commissioners in condemnation proceedings which is regular on its face for an itemized statement affects a substantial right of the relator to have it confirmed unless sufficient cause is shown, and is appealable. *Bd. of Water Com'rs of Philmont v. Shutts*, 25 App. Div. 22, 49 Supp. 319, 83 St. Rep. 319.

Where, after a trial before a referee of the issues raised by an answer to a petition in condemnation proceedings, a report has been made and judgment has been entered dismissing the petition, with costs, but "without prejudice to the plaintiff's right to begin other proceedings," an appeal therefrom by the defendant will be dismissed. *Village of Canandaigua v. Benedict*, 13 App. Div. 600, 43 Supp. 630.

Where, by contract, a railroad company and a city are each liable for one-half the amount of compensation awarded for the taking of land for a grade crossing, notice of appeal from the order confirming such award must be served on such railroad company, or the appeal must be dismissed. *Matter of Grade Crossing Com'rs*, 68 App. Div. 560, 74 Supp. 205.

A petitioner who obtains an order confirming the report of commissioners is not prohibited from taking an appeal therefrom. *Matter of Metropolitan Elevated R. R. Co.*, 36 St. Rep. 606, 13 Supp. 367.

The fact that the commissioners made a personal inspection of the property, while not necessarily governing the action of the appellate court, has very great weight. *Aiken v. Water Com'rs of Amsterdam*, 82 Hun, 265, 63 St. Rep. 560, 31 Supp. 254. See, also, the *Matter of Gilroy*, 78 Hun, 260, 60 St. Rep. 237, 28 Supp. 910. The fact, however, that the commissioners viewed the premises and to some extent acted upon the information so obtained does not prevent the court from reviewing their award on the question of damages. *Matter of Metropolitan Elevated R. R. Co.*, 76 Hun, 375, 59 St. Rep. 94, 27 Supp. 756. The award of commissioners is to be reviewed upon the facts as well as upon the law by the General Term. *Matter of Brooklyn Elevated R. R. Co.*, 80 Hun, 355, 61 St. Rep. 845, 30 Supp. 131.

The Supreme Court will not set aside an award for every technical error, where no injustice appears to have been done. *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 279, citing *Troy & Boston R. R. Co. v. Northern Turnpike Company*, 16 Barb. 100, which holds that the error to be reviewed must be of such a character as to show that the commissioners misapplied the principles upon which they were required to make their appraisal, and that the party appealing may have been injuriously affected by such misapplication. Same principle, *Matter of Rondout & Oswego R. R. Co. v. Deyo*, 5 Lans. 298; *Matter of Bushwick Avenue*, 48 Barb. 9; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169. Only the record before the commissioners can be reviewed. *N. Y. & Erie R. R. Co. v. Coburn*, 6 How. 223; *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177; *Rochester & Syracuse R. R. Co. v. Budlong*, 6 How. 467; *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 How. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. The appellate court will not disturb an appraisal for technical errors, or unless the commissioners have clearly gone astray and disregarded legal principles. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Arnott*, 27 Hun, 151; *Matter of N. Y., West Shore & B. R. R. Co. v. Dudleston*, 29 Hun, 609; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *N. Y., West Shore & B. R. R. Co. v. Gennet*, 37 Hun, 317. In reversing an order of a Special Term appointing commissioners of appraisal on application of the railroad company, it is the duty of the court at General Term to examine the evidence and determine whether the petitioner has fairly made out a case establishing that the premises are necessary for its use; when this appears, and where the company has acted in good faith and exercised a reasonable discretion, the court will not interfere, although in a proper case it has the power. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 35 Hun, 220.

Appellate courts interfere with the amounts of awards with great reluctance. *Matter of Thompson*, 24 St. Rep. 433, 5 Supp. 370, 1 Silvernail, 389. Where no exception was taken at the trial, and the report, having evidence to support it, is affirmed, the appellate court will not interfere. *Matter of Metropolitan Elevated R. R. Co.*, 36 St. Rep. 224, 13 Supp. 159. Nor will it seek for technical errors in the admission or rejection of evidence, where no erroneous methods are shown, nor erroneous principles adopted by commissioners in making their award. *Matter of Silver Creek & Dunkirk Railway Co.*, 45 St. Rep. 66, 18 Supp. 331.

In proceedings by a city to condemn lands under the waters of a river, wherein it appeared that the owner in fee of the lands was not a riparian owner, and the evidence as to value was conflicting and somewhat speculative, the action of the commissioner in awarding nominal damages will not be disturbed on appeal. *Matter of City of Buffalo*, 189 N. Y. 163.

The appellant's right to a stay pending appeal is not an absolute one, but

whether it shall be granted or refused rests in the discretion of the court, and must be determined by the circumstances of each case. *Manhattan Ry. Co. v. Stroub*, 70 Hun, 363, 24 Supp. 68, 53 St. Rep. 811.

Where an appeal is taken from a judgment, and order confirming an award, and the judgment is in favor of the one who holds the fee to certain property and against one who held the same under a lease from a former owner, the proceedings will not be stayed pending appeal, where defendant tenders no bond, and when it does not appear that plaintiff is not entirely able to make good all damages. *Matter of Manhattan Ry. Co. v. Stroub*, 53 St. Rep. 811.

It is held, in *Matter of Metropolitan El. R. R. Co.*, 51 St. Rep. 827, 22 Supp. 298, that section 3375 cuts off the absolute right of appellant to a stay of proceedings pending the appeal under section 1352, by simply giving an undertaking.

Where a first report made by commissioners appointed in condemnation proceedings was set aside on appeal not upon the merits but solely upon the ground that one of the commissioners was an improper person to act, and new commissioners were appointed, an appeal lies from the order confirming the report of the new commissioners.

Such report is not made final and conclusive by section 3377 of the Code of Civil Procedure, as a second determination is only conclusive under said section where the previous decision was set aside upon the merits. *Matter of Lake Shore & M. S. R. R. Co.*, 140 App. Div. 339.

Subd. 2. Appeal to Court of Appeals.

An order of General Term reversing an order of Special Term affirming an award of commissioners and dismissing the whole proceeding, leaving the client without any award whatever, is appealable to the Court of Appeals. *In re Clark v. Water Commissioners of Amsterdam*, 148 N. Y. 1, rev'g 74 Hun, 294. But an order of the General Term, affirming an order of the Special Term, confirming the report of commissioners appointed under the provisions of the Rapid Transit Act, is not appealable when there is presented only an error of law or fact, and no question as to the jurisdiction of the commissioners is raised. *Matter of Brooklyn El. R. R. Co. v. Flynn*, 147 N. Y. 344, citing *Matter of the Metropolitan El. R. R. Co.*, 128 N. Y. 600, to the point that condemnation proceedings under this act were governed by the General Railroad Act of 1850, citing *Matter of the Commissioners of the State Reservation at Niagara*, 102 N. Y. 734, and holding that if the case presented a question of jurisdiction, the award might be different. *Matter of S. B. R. R. Co.*, 143 N. Y. 253. In *Matter of the Manhattan Ry. Co. v. O'Sullivan*, 8 App. Div. 320, it was held that an order confirming the report of commissioners is a final order, and the question whether an appeal lies to the Court of Appeals is a

matter to be determined by that court. Holding further that, where the corporation instituting a proceeding desires to appeal from an award in favor of the owner for a substantial sum, the corporation should not be allowed to keep the property taken, and also retain, during the pendency of the appeal, the amount of the award.

Where commissioners make a merely nominal award, which is confirmed at Special Term but reversed at General Term, upon the ground that it was a case for substantial appraisal, the order is not appealable to the Court of Appeals. *Matter of Southern Boulevard R. R. Co.*, 128 N. Y. 93, 38 St. Rep. 844, aff'g 58 Hun, 497, 35 St. Rep. 550, 12 Supp. 466.

An appeal lies to the Court of Appeals from an order of the General Term, affirming an order of the Special Term in proceedings to acquire lands involving the question of the right to condemn such lands under the statute. *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137. But it will not review matters of discretion. *New York Central R. R. Co. v. Marvin*, 11 N. Y. 279; *Matter of N. Y. C. & H. R. R. R. Co.*, 64 N. Y. 60; *Matter of Kings County El. R. R. Co.*, 82 N. Y. 100. On appeal to the Court of Appeals no objections can be raised as to the irregularity in the proceedings, which were not taken below. *Buffalo & N. Y. City Co. v. Brainard*, 9 N. Y. 100. An order of the Supreme Court denying the owner's application to have the report sent back with directions to state the ground of the commissioner's decision rests in discretion, and is not reviewable in the Court of Appeals; so, also, as to an order based on conflicting evidence, refusing to set aside an award on the ground of misconduct. *Matter of Prospect Park R. R. Co.*, 85 N. Y. 489, dism'g appeal from 24 Hun, 199. An appeal from an order awarding damages for lands condemned is a judicial proceeding, and an appeal in such proceeding is not reviewable in the Court of Appeals, except in case of a final order. The Court of Appeals has no jurisdiction to review an order of the General Term, reversing an order of the Special Term making an award for lands condemned, and directing a new appraisal, where it does not appear that the order was not made in the exercise of the discretion confided in the court by the act, and the court cannot look into the opinion of the General Term for the grounds of the decision. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. An appeal from so much of an order of the General Term, reversing an award confirmed by the Special Term, as refused to appoint new commissioners, when the latter were named in a stipulation, is reviewable in the Court of Appeals. *Matter of N. Y. & Lackawanna, etc., R. R. Co.*, 98 N. Y. 447.

An appeal will not lie to the Court of Appeals from an order confirming the second report of commissioners; a second report of such commissioners is final and conclusive, unless there has been irregularity affecting their jurisdiction, or fraud, mistake, or accident such as would authorize a

court of equity to set aside a judgment, referee's report, or award of arbitrators. Such report cannot be attacked collaterally by motion. *Matter of Southern Boulevard R. R. Co.*, 141 N. Y. 532, 57 St. Rep. 818; *Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253, 62 St. Rep. 150.

An order of the Special Term in condemnation proceedings modifying and correcting a prior order in the proceedings is a final order, and an appeal to the Court of Appeals lies from an order of the Appellate Division reversing it. *Matter of Bd. of Education*, 169 N. Y. 456, rev'g 59 App. Div. 258, 69 Supp. 572.

An order and judgment entered on a decision of the Appellate Division reversing an order and judgment of the Special Term condemning water rights and dismissing the proceedings, are appealable to the Court of Appeals. *Village of Champlain v. McCrea*, 165 N. Y. 264, rev'g 33 App. Div. 259, 53 Supp. 1096.

An order of the Appellate Division reversing an order of the Special Term appointing commissioners to ascertain and determine the amount of damage by reason of a change of grade is a final order from which an appeal lies to the Court of Appeals. *Matter of Torge v. Village of Salamanca*, 176 N. Y. 324, rev'g 86 App. Div. 211, 83 Supp. 672.

The Special Term reversed and confirmed in part a report of commissioners of estimate and assessment in the city of New York; *held*, that under sections 986, 988 and 989, of the charter of the city the Appellate Division has jurisdiction to review the order of the Special Term, and that from its decision upon such review an appeal lies to the Court of Appeals. *Matter of City of N. Y.*, 182 N. Y. 281, aff'g 101 App. Div. 527, 92 Supp. 8.

The Court of Appeals is without jurisdiction to review an order of the Appellate Division, affirming an order appointing commissioners to ascertain the damages caused by the change of grade of a village street, because it is not a final order in a special proceeding. *Matter of Grab*, 157 N. Y. 69, dism'g appeal from 31 App. Div. 610, 52 Supp. 395.

The Court of Appeals cannot review conflicting evidence. *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 494.

An order of the Appellate Division, reversing an order of the Special Term vacating a final order and judgment in a condemnation proceeding, is not a final order in the special proceeding, within the meaning of the Constitution and section 190 of the Code of Civil Procedure, and, therefore, is not appealable as of right to the Court of Appeals. *City of Johnstown v. Wade*, 157 N. Y. 50, dism'g appeal from 30 App. Div. 5.

This case is distinguished in *Village of Champlain v. McCrea*, 165 N. Y. 264, in opinion of Bartlett, J., at page 269, where it is held that the appeal in that case will lie upon the ground that it is not only a reversal of the order and judgment but that the Appellate Division dismissed the

proceeding so that the order and judgment entered on the decision were final, while in the *City of Johnstown v. Wade*, it was held that the order of the Appellate Division reversing an order of the Special Term vacating the final order and judgment in condemnation proceedings is not a final order in a special proceeding, and, therefore, is not appealable.

It will be presumed that the Appellate Division reversed a judgment of the Special Term upon the law where its order does not state that the reversal was upon a question of fact, and in such case the Court of Appeals will consider whether the findings are supported by the evidence, and if the record so discloses they are conclusive upon it. *Village of Champlain v. McCrea*, 165 N. Y. 264, rev'g 33 App. Div. 259, 53 Supp. 1096.

Appeal from a final order in condemnation proceedings where the decree of condemnation is not brought up either directly or by including it in the notice of appeal only brings up for review proceedings subsequent to the decree. *Long Island Railroad Co. v. Garvey*, 159 N. Y. 334.

In *Matter of Daly*, 173 N. Y. 640, a motion to dismiss an appeal from an order of the Appellate Division which modified and affirmed as modified an order of the Special Term setting aside the report of the commissioners of appraisal was granted on the ground that the order was not a final determination of the proceeding.

An appeal lies to the Appellate Division from an order of the Special Term which vacated an award made by the commissioners of appraisal to ascertain the compensation to be made for land taken for water supply for the city of New York, by virtue of chapter 724 of the Laws of 1905, and the acts amendatory thereof. *Matter of Simmons*, 203 N. Y. 241, rev'g 144 App. Div. 255.

Subd. 3. New Appraisal. § 3377.

§ 3377. When appellate division may direct a new appraisal.

On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

The provision that the determination as to damages for land taken, made by commissioners of appraisal in their second report, shall be final and conclusive precludes as well as review by a common-law certiorari as by appeal. *People ex rel. Schuylerville, etc., R. R. Co. v. Betts*, 55 N. Y. 600. Such second report being final and conclusive in itself, it needs no order of confirmation, and is not reviewable on appeal. *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 489, dism'g appeal from 24 Hun, 199. Only legal errors and irregularities can be reviewed on second

report. The judgment of the commissioners, in deciding upon the amount of damages to be allowed, cannot be reviewed. *Matter of Prospect Park & C. I. R. R.*, 20 Hun, 184. To authorize a court to review on motion a second report, something more must be apparent than such errors of law or fact as are reviewable on appeal, and which would, if established, require a reversal and new hearing. There must be such an irregularity, fraud, or mistake in the proceedings of the commissioners as would authorize the court under its established practice to set aside a judgment or verdict in an action on a motion. The report cannot be set aside because of an error committed by the commissioners in hearing or excluding testimony to which one of the parties objected, nor because of any ordinary ruling in the progress of a trial to which an objecting party must reserve his right of remedy by an exception. *Matter of N. Y. Elevated R. R. Co.*, 41 Hun, 502. Although under the statute the petitioner cannot on appeal obtain a review on the merits of the second award, yet it is within the power of a court of equity to set aside any excessive award obtained by fraud or misconduct of the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 St. Rep. 456. The Supreme Court may set aside the second report and remove the commissioners on account of gross error and misconduct. *Matter of Prospect Park & C. I. R. R. Co.*, 20 Hun, 184. A method of correcting error on a new appraisal may arise should the new appraisers proceed on fundamentally erroneous view of the law. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. The refusal of commissioners to conform to the decision of the Supreme Court on the first hearing is misconduct for which they may be removed. *N. Y., Lackawanna & W. R. R. Co. v. Bennett*, 2 How. N. S. 225. The rule that the court may inquire into the fairness and regularity of the commissioners' acts, notwithstanding the provisions that the second report shall be conclusive, held to apply where the commissioners examined the premises and listened to the owner's representations concerning the same in the absence of a representative of the company. The commissioners have no right to accept gratuities from either party, or to accept money in excess of what is allowed by law after the report is signed. *Matter of B., N. Y. & P. R. R. Co.*, 32 Hun, 289.

The statute requires the person receiving the first award to repay the difference between the first and second award, where the second is smaller than the first, and he is not obliged to pay interest thereon except from the date of notice of confirmation of the last award. *Matter of N. Y. Elevated R. R. Co.*, 44 Hun, 117. The statute as to conclusiveness of second award does not apply when the proceedings on the first appraisal are dismissed on appeal, without a refusal or confirmation or any direction for new appraisal and new proceedings are instituted. *Matter of N. Y., W. S. & B. R. R. Co.*, 20 Hun, 646.

The distinguishing effect of the appeal authorized by section 3375 of the Code of Civil Procedure is that, upon such an appeal from a final order, the Appellate Division may direct a new appraisal, which, in that instance only, shall be final and conclusive. *Manhattan R. Co. v. O'Sullivan*, 6 App. Div. 574, 40 Supp. 326; aff'd, 150 N. Y. 569.

The report of commissioners appointed in condemnation proceedings may be set aside at Special Term for irregularity, error of law, and because of an excessive or insufficient award, but if, in such a case, a new appraisal is ordered, it will not be final and conclusive. *Manhattan R. Co. v. O'Sullivan*, 6 App. Div. 571, 40 Supp. 326; aff'd, 150 N. Y. 569.

The second report is final and conclusive and on the appeal therefrom only legal errors or irregularities in proceedings of the commissioners can be considered. *Matter of Prospect Park & Coney Island R. R. Co.*, 20 Hun, 184.

The denial of the right to review the second report does not violate the provisions of the State Constitution providing no person shall be deprived of his property without due process of law. *Matter of Commissioners of State Reservation at Niagara*, 37 Hun, 537.

The effect of the General Railroad Act holding that the second report "is final and conclusive on all the parties interested" is considered in the *Matter of Southern Boulevard R. R. Co.*, 141 N. Y. 532, citing *Matter of Prospect Park R. R. Co.*, 85 N. Y. 489; *Matter of Petition of N. Y. & H. R. R. Co.*, 98 N. Y. 12; *Matter of P. P. & C. I. R. R. Co.*, 85 N. Y. 489, and the provision of the statute is held conclusive.

In *Matter of Buffalo, etc. R. R. Co.*, 32 Hun, 289, the second report of commissioners was set aside because of their improper conduct in going upon the land to be taken, in company with the landowner and his attorney, and there examining a map produced by the former and listening to his explanation thereof, in the absence of the agent of the company, and its attorney, who were then, to the knowledge of the commissioners, on their way to meet the commissioners and view the premises. It appeared that one of the commissioners in this case rode from a village to the farm to be viewed, with, and in a carriage provided by, the landowner; that one of them took supper at the latter's house and was sent home in a carriage furnished by him, and that another accepted from the landowner a sum of money for his services and expenses, in excess of the amount allowed by statute, and which was understood to be so at the time. *Held* that such conduct was improper and required the report to be set aside.

It was held under the General Railroad Act that the General Term might set aside and vacate a report for errors of law or of fact and direct a new appraisal, in which case the second report is final and conclusive on all of the parties interested, except in case there is some irregularity

in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake, or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee, or an award of arbitrators. It seems that where a case is brought within these exceptions the Supreme Court might, upon motion, set aside the report of the commissioners. *Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253.

ARTICLE XIV.

PRECEDENTS.

Precedents in Proceeding Brought by Municipal Corporation to Acquire, by Condemnation, Property of a Water Company Incorporated for the Purpose of Supplying Water to the Inhabitants of Such Municipal Corporation (Village of Waverly v. Waverly Water Co., 127 App. Div. 440, aff'd, 194 N. Y. 545).

Petition.

SUPREME COURT — TIOGA COUNTY.

THE VILLAGE OF WAVERLY,	PLAINTIFF,
<i>against</i>	
THE WAVERLY WATER COMPANY, FRED H. SAWYER, AS TRUSTEE FOR THE MORTGAGE BONDHOLDERS OF THE WAVERLY WATER COMPANY AND GEORGE H. GOFF,	DEFENDANTS.

To the Supreme Court of the State of New York:

The petition of the village of Waverly, a municipal corporation and political division of the State of New York, respectfully shows:

1. That your petitioner is a municipal corporation duly organized under the laws of the State of New York, and is situated in the county of Tioga in said State. That the names and places of residence of the principal officers of said village (being members of the board of trustees thereof), were at the time of the execution and filing of this petition, and at the time of the commencement of this proceeding, as follows:

(INSERT NAMES)

That there is no board of water commissioners in said village of Waverly; and the board of trustees of said village exercises and has all of the powers and is subject to all the liabilities and must perform all the duties of a board of water commissioners as provided by the Village Law.

2. The specific description of the property, rights, privileges and franchises herein and hereby sought to be condemned, together with the location of the property by metes and bonds, with reasonable certainty, is hereunto annexed and marked schedule "A," which said schedule is hereby made a part of this petition in all respects as though the same were herein fully set forth.

3. That the public use for which the said property is required is to furnish the said village of Waverly, N. Y., and its inhabitants with water for fire and domestic purposes.

The necessity of the acquisition of such property for such use is: 1. To provide the said village and its inhabitants with pure and wholesome water. 2. The said village does not now own any water system whatsoever; and cannot supply said village and its inhabitants, or either of them, with pure and wholesome water for fire and domestic purposes. That the said system herein sought to be purchased is the only water system existing

in said village. 3. That the sources of supply owned and controlled by the defendant, the Waverly Water Company, are conveniently located for supplying the inhabitants of the village of Waverly, and are entirely within the State of New York. That, as your petitioner is informed and believes, the defendant, the Waverly Water Company, has diverted and is now diverting a portion of said water supply, in that the same is furnished to a water company, organized and existing under the laws of the State of Pennsylvania, for the purpose of supplying the inhabitants of a borough of said last named State with water, and that a portion of the water supply owned by the said Waverly Water Company is and has been so diverted; that by reason of such diversion the reservoirs of the said Waverly Water Company are at certain seasons of the year, rendered inadequate, the water therein impure and offensive, and the protection against fire less efficient. That in order to supply and make up for such diversion and insufficient source of supply, the defendant, the Waverly Water Company, has at various times purchased and furnished from another source outside of the State of New York water for its mains, but at such times the pressure was insufficient for adequate fire protection, and the water so furnished less pure and wholesome for domestic purposes. That it is necessary for the village of Waverly to own and control the sources of supply now owned by the defendant, the Waverly Water Company, in order that the same be preserved and used for the benefit of the residents of the village of Waverly alone. 4. A majority of the electors of the said village desire to acquire, own, control and carry on a system of water works for supplying the said village and its inhabitants with water for fire and domestic purposes, and upon August 30, 1906, at a special election then held for the purpose, voted to purchase the present system of water-works, at not exceeding a certain fixed price. That it is necessary that the said village should purchase said system in order that it may provide for a future adequate supply; that it may take steps to, at all times hereafter, provide pure and wholesome water, and that it may provide said water both to its inhabitants and for fire purposes more economically than the same is now provided by the said Waverly Water Company. 5. That it is necessary that the said village should own, control and manage the said water system in order to prevent contamination of the water furnished through such system. That the said defendant, the Waverly Water Company, has been, and now is, knowingly and intentionally suffering and permitting the contamination of the said water supply. That in case the said village should own, control and manage such water system it could and would at all times prevent such contamination and could and would at all times deliver pure and wholesome water to the inhabitants of said village. 6. That the mains in some parts of the said water system have been permitted to become clogged with mud and sediment to such an extent as to prevent proper fire protection and the necessary pressure, and to render the water passing through such portion of the said mains unwholesome and unsanitary; that the said defendant, the Waverly Water Company, has at all times neglected, and now does neglect, to properly flush the said mains so as to render them of sufficient carrying capacity to give proper fire protection, and so as to render the water flowing through them sanitary and wholesome. That in case the said village owned, controlled and carried on the said system, it could and would properly and suitably flush the said mains for the purposes aforesaid. 7. That the said village has established and now owns a sewer system for the use of the inhabitants thereof, which sewer system is to be enlarged and extended. That it is and will be necessary to periodically flush the said sewers and thereby clean the same of deposits that are continuously being made therein. That it is necessary for the said village to operate its own water system for the purpose of flushing said sewers, which sewers could be flushed and cleaned at the same time the water

mains were being flushed and cleaned, and the water used in so flushing and cleaning the water mains could be made to pass through the sewers and thus clean and flush such sewers. 8. The system of water-works now used by the Waverly Water Company does not extend in and along some of the streets of said village, upon which a considerable number of people reside, and said water company has neglected and is now neglecting to lay mains in and through said streets, and by reason thereof such inhabitants are unable to procure water from a public water supply for domestic purposes, and are without fire protection, and it is necessary that said streets, and the residents thereon, be supplied with water for domestic purposes and also water with sufficient pressure for fire protection. And in case the said water system should be owned and operated by the village of Waverly, such village could and would take steps to lay mains through said streets to the end that such inhabitants might be supplied with water for domestic purposes, as well as to protect them in case of fire.

That this proceeding is instituted to acquire the existing system of the water-works of the defendant, the Waverly Water Company, pursuant to the provisions of the Village Law.

That on the 12th day of August, 1905, at least twenty-five electors of such village, qualified to vote upon a proposition, did duly petition the board of trustees of said village, and file in the office of the said board of trustees a petition that a special election be held in the said village for the purpose of voting upon the following proposition: "Shall the village of Waverly, by and through its board of trustees, acquire the existing private system of water-works of the Waverly Water Company, of said village of Waverly, including its mains, lands, easements, rights and property, at a price not to exceed the sum of one hundred and twenty-five thousand dollars (\$125,000), and issue therefor the bonds of the said village of Waverly, as provided in sections 128 and 129 of the Village Law."

A certified copy of which said petition is hereunto annexed. That upon receiving and filing the said petition, the said board of trustees did, at a special meeting duly and regularly called and held on said 12th day of August, 1905, by proper resolutions duly passed, cause the said proposition to be submitted at a village election of said village and did designate the hours of opening and closing the polls, which include at least four consecutive hours between sunrise and sunset, and designated the place of holding the election and directed the publication and posting of the notices of said election, as required by law; that the said election was directed to be held at the village hall in the village of Waverly, upon the 30th day of August, 1905, from six o'clock A. M., until sunset of that day, being at least four consecutive hours between sunrise and sunset, which said time was at least ten days and not more than twenty days after the presentation of such petition; certified copies of said resolutions are hereunto annexed. That notice of the said election was published at least once in the official paper published in said village and a printed copy of such notice of election was conspicuously posted in at least six public places in the village of Waverly, specifying the time and place of holding such election and hours of opening and closing the polls thereof and setting forth in full the said proposition to be voted upon, all of which more fully appears by the certified copies of the affidavits of publication and posting which are hereunto annexed. That the said notice was published and the said notices were posted as aforesaid at least ten days before the said village election. That the said special election was duly held at the village hall in said village of Waverly on the 30th day of August, 1905, from six o'clock in the morning to sunset of that day; that all votes upon said proposition were by ballot and that such ballots were in the form prescribed by the Election Law. That the canvass of the votes cast at such election

was begun immediately after the close of such election and without intermission, and such canvass continued without intermission or adjournment, and was completed without adjournment; that thereupon and without any adjournment said board of trustees, acting as canvassers and inspectors of election at such election, immediately signed a certificate and returned as such canvassing board, setting forth the whole number of votes cast upon said proposition, the number of votes cast for, or in favor of said proposition, the number of votes cast against such proposition, and the number of spoiled ballots that were not counted; and also a statement that a majority of votes cast upon such proposition being in favor thereof, such proposition was duly declared carried; that the said certificate of the said canvassing board was forthwith after its completion and on the 30th day of August, 1905, and before nine o'clock in the forenoon of the following day, filed with the village clerk of said village, in the manner and as required by law, all of which more fully appears by the affidavit of Wesley H. Brougham, verified February 24, 1908, and the certified copy of the said certificate of election, filed in the office of the said village clerk on the 30th day of August, 1905, which are hereunto annexed. That the said petition was presented to the said board of trustees as aforesaid, after the annual election of said village for the year 1905, and before the 1st day of January, 1906, and the said special election was not held in the months of February or March. That the total number of votes cast upon the said proposition was 771; that the number of votes cast for, or in favor of, the said proposition was 450; that the number of votes cast against said proposition was 313; that the number of spoiled ballots, which were not counted was 8; that a majority of all the votes cast at the said special election were for and in favor of the said proposition, and the said proposition was duly carried thereat.

4. The names and places of residence of the owners of such property are as follows: The Waverly Water Company, which is a domestic corporation duly organized under the Laws of the State of New York, and having its principal office at the village of Waverly, N. Y., said principal office being at No. 316 Broad street, in the said village of Waverly, N. Y., and whose president is J. Theodore Sawyer, whose residence is at No. 329 Chemung street, in said village, and Fred A. Sawyer, as trustee for the mortgage bondholders of the Waverly Water Company, who resides at No. 416 Chemung street in said village; that the said trust mortgage was given by the defendant, the Waverly Water Company, to the said Fred A. Sawyer, as trustee for the benefit of the holders of bonds issued under and secured by said mortgage to the amount of seventy thousand dollars (\$70,000), which said mortgage was recorded in the Tioga county clerk's office on November 11, 1891, 10 o'clock A. M., in book 64 of mortgages, at page 576, and which said mortgage is now, as this plaintiff is informed and believes, a valid and subsisting lien upon the property herein mentioned and described. That the defendant George H. Goff, who resides at No. 574 Clark street in said village of Waverly, has or claims to have, some contract or agreement with the defendant, the Waverly Water Company, for the ice from the reservoirs of the said company, or for the use of the icehouse, tools and buildings of said Waverly Water Company, or both.

5. That the plaintiff, the village of Waverly, has been unable to agree with the owners of the property for its purchase; that the said village of Waverly has attempted to acquire from the owners of the property herein described all of their said property, including the lands, mains, easements, rights and property, both real and personal, belonging to the said Waverly Water Company, and upon at least two occasions has requested the said Waverly Water Company to furnish a price for which the said company would sell the property, and the said company, through its duly authorized officers and agents,

has at all times neglected and refused to give or state a price or sum which the said company would take and receive as the purchase price of such property and property rights of the said company. That the plaintiff employed competent and skillful civil engineers to examine the said plant and property to estimate its full and true value, and that the said civil engineers, so employed, did to the best of their ability estimate the full value of such property at the sum of eighty-six thousand three hundred and fifty-three dollars (\$86,353). That the said plaintiff through its duly authorized officers and agents did ask and demand of the said defendant, the Waverly Water Company, the privilege of examining its books relative to the sizes and times of laying of its mains and of the amount of its gross income and its expenses, and other information concerning the present value of such property, and the said defendant, the Waverly Water Company, did and has at all times refused to permit such examination to be made for and on behalf of the plaintiff herein. That on the 29th day of December, 1905, a resolution was duly passed by the board of trustees of the plaintiff herein, directing and empowering the president and clerk of said board to make an offer in writing to purchase for and on behalf of the plaintiff herein all the plant, franchises, water rights, lands, dams, easements, pipes, mains, reservoirs, hydrants and other property essential and appurtenant to a water supply, which belongs to the said defendant, the Waverly Water Company, at and for the sum of one hundred and five thousand dollars (\$105,000), the same to be free and clear from all liens or incumbrances thereon, a certified copy of which said resolution is hereunto annexed; that pursuant to the said resolution the said president and clerk of the said board of trustees did duly execute such notice and on the 30th day of December, 1905, the same, together with a copy of the said last named resolution, were personally served upon the defendant, the Waverly Water Company, by delivering the same to J. Theodore Sawyer, the president thereof. That the said defendant, the Waverly Water Company, has at all times since such service neglected and refused, and does still neglect and refuse, to accept the said offer, and has at all times neglected and refused to name or state any price or sum for which the said last named defendant would sell, transfer and convey its said plant, franchises, water rights, lands, easements, dams, pipes, mains, reservoirs, hydrants and other property essential and appurtenant to a water supply, belonging to the said water company, to this plaintiff, although it has repeatedly and at different times been asked and requested so to do, by and on behalf of the plaintiff herein. That the said offer of one hundred and five thousand dollars (\$105,000) was, in your petitioner's best judgment and belief, a liberal offer therefor, and at least the full value of the said property. That the said offer, and the said request, and the negotiations and attempts upon the part of the plaintiff herein to purchase the said property, were made and had in good faith and for the purpose of agreeing with such owners as to the amount and value of said property. That the reason of the inability of the plaintiff herein to agree with the owners of the property is on account of the refusal of the said owners to name or state any price or sum for which the said property would be sold and conveyed, and could be purchased by the plaintiff herein, although repeatedly requested so to do, and on account of the neglect and refusal of the said owners to accept the offer of the plaintiff herein to purchase the said plant at and for the price and sum hereinbefore mentioned, and because of the refusal of the said owners to enter into negotiations with the plaintiff herein for the purchase thereof.

6. That the value of the property herein sought to be condemned is eighty-six thousand three hundred and fifty-three dollars (\$86,353).

7. That it is the intention of the plaintiff, the village of Waverly, in good faith, to complete the work and improvements, for which the property herein

described is to be condemned; and that all preliminary stops required by law have been taken to entitle the plaintiff, the village of Waverly, to institute this proceeding.

That no previous application has been made to any court for a sale, order or judgment for the condemnation of the property herein mentioned, or for the appointment of commissioners of appraisal, except such as has or have been made in this proceeding.

WHEREFORE the plaintiff demands that it may be adjudged that the public use requires the condemnation of the real property herein described, and that the plaintiff, the village of Waverly, is entitled to take and hold such property for the public use herein specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners of the property so taken, and that the plaintiff, the village of Waverly, may have such other or further relief, or both, as may be just and equitable.

Dated, *February 24, 1908.*

The Village of Waverly,
(*by Orville H. Lawrence, resident of the Village of Waverly.*)
Frank A. Bell, Village Clerk of the Village of Waverly.

STATE OF NEW YORK, }
COUNTY OF TIOGA. } ss.:

ORVILLE H. LAWRENCE and FRANK A. BELL, each being duly and severally sworn, for himself, deposes and says: That he has read the foregoing amended Petition and knows the contents thereof, and that the same is true to the knowledge of each of said deponents, except as to the matters therein stated to be alleged upon his information and belief, and that as to those matters he believes it to be true.

Said deponents further say, that the said Orville H. Lawrence is the president of the village of Waverly, the plaintiff above named, and the said Frank A. Bell is the village clerk of the said village of Waverly; that this proceeding was duly authorized by the board of trustees of the said village of Waverly, by a resolution duly passed at a regular meeting thereof, on the 13th day of January, 1906; that the reason this verification is made by these deponents is that the said Lawrence is the president of the village of Waverly, and the said Bell is the clerk of said village, and that the said village, the plaintiff in this proceeding, is a municipal corporation.

(*Jurat.*)

("Schedule A," containing description of real estate and property mentioned in the foregoing petition.)

Petition of Electors for Special Election.

To the President and Honorable Board of Trustees of Waverly, N. Y.:

We, the undersigned qualified electors of the village of Waverly, N. Y., hereby respectfully petition your honorable board as follows:

That a special election to be held in this village, for the purpose of voting upon the following proposition:

"Shall the village of Waverly by and through its board of trustees acquire the existing private system of water-works of the Waverly Water Company, of said village of Waverly, including its mains, lands, easements, rights and property, at a price not to exceed the sum of one hundred and twenty-five thousand dollars (\$125,000), and issue therefor the bonds of said village of Waverly, as provided by sections 128 and 129 of the Village Law."

(Signed, *A. J. Thompson, and thirty-five other electors of the said village of Waverly.*)

STATE OF NEW YORK, }
COUNTY OF TIOGA, } ss.:

I, FRANK A. BELL, hereby certify that I am the village clerk of the village of Waverly, Tioga county, N. Y., and that I have compared the annexed copy of the petition with the original thereof, filed in my office on the 12th day of August, 1905, and that the same is a correct and true copy of said petition and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed the seal of the village of Waverly, this 24th day of February, 1908.

FRANK A. BELL,
Clerk of the Village of Waverly.

Proceedings in the Board of Trustees.

A petition was presented, signed by more than twenty-five qualified electors, asking:

"That a special election be held in this village for the purpose of voting upon the following propositions:"

"Shall the village of Waverly by and through its board of trustees acquire the existing private system of water-works of the Waverly Water Company, of said village of Waverly, including its mains, lands and easements, rights and property, at a price not to exceed the sum of one hundred and twenty-five thousand dollars (\$125,000), and issue therefor the bonds of said village of Waverly, as provided by sections 128 and 129 of the Village Law?"

It was moved by Trustee Genung, duly seconded and carried, that said proposition be submitted at a special election, which is hereby appointed, to be held at the village hall, in the village of Waverly, N. Y., on Wednesday, August 30, 1905, from 6 o'clock A. M., till sunset.

It was moved, duly seconded and carried, that the clerk cause the necessary publication and posting of the notices for said election, cause the ballots to be prepared and the room fitted for said election,

(Add certificate of authentication by village clerk.)

Election Notice.

Notice is hereby given that a special election of the village of Waverly, N. Y., will be held at the village hall, on Wednesday, August 30, 1905, and that the polls will be opened at 6 o'clock A. M., and close at sunset, for the purpose of voting upon the following proposition:

"Shall the village of Waverly by and through its board of trustees acquire the existing private system of water works of the Waverly Water Company, of said village of Waverly, including its mains, lands, easements, rights and property at a price not to exceed the sum of one hundred and twenty-five thousand dollars (\$125,000), and issue therefor the bonds of said village of Waverly, as provided by sections 128 and 129 of the Village Law."

FRANK A. BELL,

Dated this 12th day of August, 1905. *Clerk of the Village of Waverly.*

STATE OF NEW YORK, }
COUNTY OF TIOGA, } ss.:

RAY W. McEWEN, being duly sworn, says that he is local editor of the Waverly Free Press, a weekly newspaper published at Waverly, Tioga county, N. Y., and that the advertisement of special election, a copy of which is hereunto annexed, was published for two consecutive weeks in the entire editions of said newspaper; the first insertion having been made on August 18, 1905, and the last insertion on August 25, 1905.

(Jurat.)

RAY W. McEWEN.

(Certificate of authentication by village clerk.)

Affidavit of Posting Notice of Election.

(Insert copy of election notice, same as above.)

STATE OF NEW YORK, }
COUNTY OF TIOGA, } ss.:

FRANK A. BELL, being duly sworn, deposes and says, that he is over twenty-one years of age, and resides in the village of Waverly, Tioga county, N. Y.

That on the 17th day of August, 1905, he securely fastened up a copy of the annexed notice of election in public places in the village of Waverly, Tioga county, N. Y., as follows (naming and describing seven places situated in the said village of Waverly).

(Jurat.)

FRANK A. BELL.

(Certificate of authentication by village clerk.)

Affidavit of Inspector of Election.

STATE OF NEW YORK }
COUNTY OF TIOGA, } ss.:

WESLEY H. BROUGHAM, being duly sworn, deposes and says, that he resides in the village of Waverly, Tioga county, N. Y., and that he is and was on the 30th day of August, 1905, one of the trustees of said village of Waverly. That on the 30th day of August, 1905, he attended at the village hall in the village of Waverly, Tioga county, N. Y., and acted as a member of said board as one of the inspectors for said election.

That said election was declared closed at sunset on that day, and the canvass of the votes cast at such election was begun immediately after the close of such election and without any intermission, and such canvass continued without intermission or adjournment and was completed without adjournment.

That thereupon the members of the board of trustees acted as canvassers and inspectors of election, and immediately signed a certificate and return as such canvassing board setting forth the number of votes cast upon the proposition,

“Shall the village of Waverly by and through its board of trustees acquire the existing private system of water-works of Waverly Water Company, of said village of Waverly, including its mains, lands, easements, rights and property, at a price not to exceed the sum of one hundred twenty-five thousand dollars (\$125,000), and issue therefor the bonds of said village of Waverly, as provided by sections 128 and 129 of the Village Law?”

That the said certificate was forthwith and immediately filed with Frank A. Bell, the clerk of the village of Waverly.

(Jurat.)

WESLEY H. BROUGHAM.

Certificate of Election by Inspectors of Election.

This is to certify that a special election was duly held at the village hall, in the village of Waverly, on the 30th day of August, 1905, between the hours of six o'clock A. M. till sunset, pursuant to resolution of the board of trustees of said village, adopted by said board at a meeting of said board held the 12th day of August, 1905.

That at such election the following proposition was submitted to the qualified electors of said village and voted upon:

“Shall the Village of Waverly, by and through its Board of Trustees, acquire the existing private system of water works of Waverly Water Company, of said Village of Waverly, including its mains, lands, easements, rights and property, at a price not to exceed the sum of one hundred twenty-five thousand dollars (\$125,000) and issue therefor the bonds of said Village of Waverly, as provided by sections 128 and 129 of the Village Law.”

That at said election upon said proposition the total number of ballots cast was 771.

That the number of votes cast for said proposition was 450.

That the number of votes cast against said proposition was 313.

That the number of spoiled ballots was 8.

A majority of votes cast upon said proposition being in favor thereof, the proposition was duly declared carried.

Dated, Waverly, N. Y., *August 30, 1905.*

L. F. FORD AND FIVE OTHERS,
Inspectors of Election.

(Affidavit, verifying the foregoing certificate, signed and sworn to by the six inspectors of election.)

(Certificate of authentication by village clerk.)

Resolution Authorizing President and Clerk of Village to Make Proposition for purchase of Water Works.

The following resolution was offered by Trustee Lord, seconded by Trustee Genung, and unanimously adopted:

Resolved, That the president and clerk of the board of trustees of the village of Waverly, N. Y., be and they hereby are authorized, empowered and directed, to make an offer in writing to purchase for and on behalf of the village of Waverly, N. Y., all the plants, franchises, water rights, lands, dams, casements, pipes, mains, reservoirs, hydrants and other property essential and appurtenant to a water supply which belongs to the Waverly Water Company at and for the sum of one hundred and five thousand dollars (\$105,000), the same to be free and clear from any and all liens and incumbrances thereon, and that said offer be served on said company, and a duplicate thereof filed in the office of the clerk of the county of Tioga.

(Certificate of authentication by village clerk.)

Order Overruling Preliminary Objections to Foregoing Petition.

(Caption and title.)

This matter coming on at a Trial and Special Term of this court held in and for the county of Tioga in the village of Owego on the 9th day of March, 1908, upon the petition of the petitioners verified February 24, 1908, and having been duly adjourned for argument at the same court to the 23d day of March and at said time and place the plaintiff having presented its said petition and appearing by Frank A. Bell, Esq., its attorney, and by Randolph Horton of counsel, and the defendant, the Waverly Water Company, having appeared by Frederick E. Hawkes, its attorney, and having interposed the following objections to the sufficiency of said petition, viz.:

"The defendant, the Waverly Water Company, hereby raises preliminary objections to the sufficiency of the petition in the above-entitled matter, verified February 24, 1908, and maintains that the village of Waverly, the plaintiff, had no power to institute this action, and that the court has no jurisdiction to entertain the same, upon the following grounds:

"1. That said petition affirmatively shows that the village of Waverly, the plaintiff, did not comply with section 5 of the General Municipal Law of this State in that the resolution submitted to the taxpayers August 30, 1905, as set forth in said petition, to provide for the contracting of the debt for the purchase of the property of this defendant did not provide for the raising annually by tax a sum sufficient to pay the interest and the principal as the same shall become due.

"2. That said petition affirmatively shows that said resolution submitted to the taxpayers August 30, 1905, as set forth in said petition, did not authorize the board of trustees of the plaintiff to raise any money to purchase the

property of this defendant, and that, therefore, the plaintiff had no power to attempt to purchase the property of this defendant, described in said petition, either under section 222 of the Village Law or under subdivision 5 of section 3360 of the Code of Civil Procedure, and that, therefore, it had no power to institute this proceeding either under section 222 of the Village Law or section 3360 of the Code of Civil Procedure.

"3. Said petition does not allege that the property of the Waverly Water Company, specifically described therein, constitutes all the property and rights and easements of said water company or its existing system for supplying the village of Waverly and its inhabitants with water.

"4. Said petition does not contain a concise statement of any facts showing a necessity for the acquisition of the property sought to be condemned.

"5. Said petition does not show that the board of trustees of the plaintiff cannot agree with the owners of the system of water-works of this defendant for its purchase and does not show that the plaintiff has been unable to agree with the owners of the property for its purchase and does not show any reason for an inability to agree with the owners for its purchase, and affirmatively shows that the plaintiff has not taken any legal steps to attempt to agree with the owners of the property for its purchase.

"6. Said petition does not describe the property, constituting the system of water-works of the Waverly Water Company for supplying the village of Waverly and its inhabitants with water, clearly and specifically as required by law."

And the defendant, Fred A. Sawyer, as trustee, having appeared by Frederick Collin, Esq., his attorney, and having interposed the following preliminary objections to the sufficiency of said petition, viz.:

The defendant, Fred A. Sawyer, as trustee for the mortgage bondholders of the Waverly Water Company, hereby raises preliminary objections to the sufficiency of the petition in the above-entitled matter, verified February 24, 1908, and maintains that the village of Waverly, the plaintiff, had no power to institute this action, and that the court has no jurisdiction to entertain the same upon the following grounds. (Stating six objections identical with those made by the Waverly Water Company.) And the defendant, George H. Goff, having appeared by his attorney, J. B. Floyd, Esq., and having interposed the following preliminary objections to the sufficiency of said petition, viz.:

Defendant, George H. Goff, by his attorney, J. B. Floyd, appears in the above-entitled action or proceeding and offers the following preliminary objections to the sufficiency of the petition, viz.:

First: That the statutes under which the petitioner claims to act do not confer any jurisdiction over said defendant's property or interest, which relates to the ice and icehouses built near and adjoining the reservoirs of the defendant, the Waverly Water Company.

Second: That said petition is defective for the reason that it fails to set forth such interest or describe the same or give said defendant Goff any knowledge or information as to what they propose to do with said icehouses, tools and machinery as set forth in folio 27 of said amended petition.

Third: That said petition is further defective in that it fails to show or allege any necessity or right that the said petitioner should acquire the ownership of said icehouses or their contents or the lands upon which the same stand.

Fourth: That said petition shows that defendant Goff is an owner within the meaning of section 3358 of the Code. It fails to show that petitioners ever attempted to acquire the interest of said defendant Goff in the property of said water-works by purchasing or otherwise, and that as to him the service of the same confers no jurisdiction over his person or property, though Goff is a resident of Waverly, N. Y., and is under no legal disability to convey

such interest or property, but on the contrary is fully capable of conveying the same.

Fifth: That the petition herein affirmatively shows that the village of Waverly, the plaintiff, did not comply with section 5 of the General Municipal Law of this State in that the resolution submitted to the taxpayers to provide for the contracting of the debt for the purchase of the property of this defendant did not provide for raising annually by tax a sum sufficient to pay the interest and the principal as the same shall become due.

Sixth: That said petition affirmatively shows that said resolution submitted to the taxpayers, August 30, 1905, as set forth in said petition, did not authorize the board of trustees of the plaintiff to raise any money to purchase the property of this defendant, and that, therefore, the plaintiff had no power to attempt to purchase the property of this defendant, described in said petition, either under section 222 of the Village Law or under subdivision 5 of section 3360 of the Code of Civil Procedure, and that, therefore, it had no power to institute this proceeding either under section 222 of the Village Law, or section 3360 of the Code of Civil Procedure, and all of the parties having been heard and the proceeding having been held open to this time and place, and the said parties having appeared as hereinbefore set forth,

Now, upon reading and filing said petition and the said preliminary objections aforesaid, and upon motion of the plaintiff's attorney, defendant's attorneys opposed:

Ordered: 1st: That each, every and all of the said preliminary objections made upon behalf of the several defendants be, and the same hereby are, overruled and each of said defendants is hereby allowed an exception to the overruling of each of said preliminary objections.

2d: That each of said defendants is allowed twenty days after service of a copy of this order in which to file an answer to said petition and serve a copy of the same upon the plaintiff's attorney.

3d: That this proceeding is hereby adjourned to the Trial and Special Term of this court to be held at the courthouse in the city of Elmira, in and for Chemung county, on the 1st day of May, 1908, at the opening of court on that day.

Enter.

H. B. COMAN,
Justice Supreme Court.

Precedents in Proceeding Brought by the City of New York to Acquire by Condemnation Lands and Waters for a Water Supply for Said City (Matter of Simmons [Ashokan Reservoir] 130 App. Div. 350; aff'd, 195 N. Y. 537).

Petition for the Appointment of Commissioners of Appraisal.

NEW YORK SUPREME COURT — ULSTER COUNTY.

IN THE MATTER OF THE APPLICATION AND PETITION OF J. EDWARD SIMMONS, CHARLES N. CHADWICK AND CHARLES A. SHAW, CONSTITUTING THE BOARD OF WATER SUPPLY OF THE CITY OF NEW YORK, TO ACQUIRE REAL ESTATE FOR AND ON BEHALF OF THE CITY OF NEW YORK, ETC., FOR THE PURPOSE OF PROVIDING AN ADDITIONAL SUPPLY OF PURE AND WHOLESOME WATER FOR THE USE OF THE CITY OF NEW YORK.

Ashokan Reservoir,
Section No. 7.

To the Supreme Court of the State of New York, Third Judicial District:

The petition of the board of water supply of the city of New York respectfully shows to the court and alleges for and on behalf of said city:

On the 3d day of June, 1905, an act of the Legislature was passed, known as chapter 724 of the Laws of 1905, entitled "An act to provide for an additional supply of pure and wholesome water for the city of New York and for the acquisition of lands or interest therein and for the construction of the necessary reservoirs, dams, aqueducts, filters and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects."

On the 9th day of June, 1905, the Hon. George B. McClellan, mayor of the city of New York, acting under and in pursuance of the power and authority vested in him by said act, appointed J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw commissioners, for the purpose of carrying out the provisions of said act. They accepted such appointment, duly organized and immediately entered upon the discharge of their duties, and have been and now are engaged in the discharge of their duties as such commissioners under the said act and the various acts amendatory thereof and relating thereto.

The board of water supply, in carrying out the provisions of said act, did immediately and with all reasonable speed, proceed to ascertain what sources did exist and were the most available, desirable and best for an additional supply of pure and wholesome water for the city of New York. The board of water supply, in the discharge of the duties placed upon them by such act, have made such surveys, maps, plans, specifications, profiles, estimates and investigations as they deemed proper in order to ascertain the facts as to said sources of supply, that a report might be made by said board of water supply, as required by law, to the board of estimate and apportionment, with recommendations as to what action should, in its opinion, be taken with reference thereto, so that the board of water supply and the board of estimate and apportionment might be enabled to determine from what source or sources and in what manner the city of New York might best secure an additional supply of pure and wholesome water.

(The petition further recites in detail the acts and steps taken by the board of water supply, under the authority of and in compliance with the statute, for the purpose of acquiring such water supply and describes in detail the lands and waters to be acquired in this proceeding.)

The board of water supply further shows to the court and alleges that it has taken all the steps and discharged all the duties imposed upon said board of water supply to entitle the petitioner to the relief prayed for.

WHEREFORE, The board of water supply, for and on behalf of the city of New York and for the purpose of vesting the fee of the lands hereinbefore described in said city, prays this honorable court to make an order for the appointment of three disinterested and competent freeholders, at least one of whom shall reside in the county of New York, and at least one of whom shall reside in the county where the real estate sought to be acquired is situated, commissioners of appraisal to ascertain and appraise the compensation to be made to the owners of and all persons interested in the real estate laid down on said maps as proposed to be taken or affected for the purposes indicated in said act and to exercise and discharge all the powers and duties conferred upon commissioners of appraisal by said act or the acts amendatory thereof or relating thereto.

And your petitioner further prays that the court shall in said order appointing such commissioners fix the time and place of the first meeting of said commissioners, and grant such other and further relief as may be just.

Dated, *June 25, 1907.*

(Verified by Commissioner Shaw.)

BOARD OF WATER SUPPLY,
By CHARLES A. SHAW,
Commissioner.

(Caption and title.) Order Appointing Commissioners.

On reading and filing the petition of the board of water supply of the city of New York, verified by Charles A. Shaw, on June 25, 1907, for and on behalf of said board of water supply of the city of New York, from which it appears that the acquisition of the real estate described in said petition and shown on the map therein referred to, which said map was filed in the Ulster county clerk's office, on the 13th day of May, 1907, is necessary for the purpose of providing an additional supply of pure and wholesome water for the city of New York, and for the construction, operation and maintenance of the reservoir, aqueduct, culverts, tunnels and various appurtenances as set forth in said petition, and it further appearing that due and proper notice of this application has been given by posting as required by the act as more fully appears by the affidavit of Frederick Ward, verified May 29, 1907, showing the posting of thirty-seven copies of the notice of this application in hand-bill form in at least thirty-seven conspicuous places on or in the vicinity of the real estate to be taken or affected, and it further appearing that notice of this application has been given by publication as required by said act, and the court being satisfied that due and proper notice of the application herein has been given by posting and publishing as required by said act, and all provisions of said act have been complied with.

Now after hearing William B. Ellison, corporation counsel of the city of New York, in favor of granting said application and petition, and Mr. Arthur A. Brown, by Harrison T. Slosson, of counsel for certain claimants; Messrs. A. C. & F. W. Hottenroth, of counsel for certain claimants; Mr. Jerome H. Buck and Mr. G. Herbert Cone, of counsel for certain claimants, and Mr. A. T. Clearwater and Mr. Charles W. Walton, of counsel for certain claimants.

Now on motion of John J. Linson, of counsel for petitioner, it is

Ordered, that the said application be and the same hereby is granted, and it is

Further Ordered, that James Jenkins of the city of Kingston, county of Ulster and State of New York; Joseph D. Baucus, of the city and county of New York, and Peter C. Black, of the town of Ulster, Ulster county, N. Y., be, and they hereby are, appointed commissioners of appraisal to ascertain and appraise the compensation to be made to the owners of and all persons interested in the real estate laid down on said map in this proceeding, filed in said clerk's office as aforesaid, as proposed to be taken or affected for the purposes indicated in said act, and to exercise and discharge all the powers and duties conferred upon them under chapter 724 of the Laws of 1905, and the acts amendatory thereof and relating thereto, and it is

Further Ordered, that the first meeting of said commissioners is to be held at the County Court House, in the city of Kingston, Ulster county, N. Y., on the 22d day of July, 1907, at two o'clock P. M.

Enter in Ulster county:

JAMES A. BETTS,
Justice Supreme Court.

(Title.) Notice of Claim for One of the Parcels Sought to be Condemned.

To Hon. James Jenkins, Hon. Peter C. Black, Hon. Joseph D. Baucus, Commissioners of Appraisal:

James P. McGovern, claimant of Parcel No. 271A, does respectfully show and allege as follows:

First: That prior to and on the 22d day of July, 1907, the said claimant was the owner of the fee and the appurtenances and in possession of all that parcel of land in section 7, designated as Parcel No. 271A, situate in the towns of Olive and Hurley, county of Ulster, State of New York, and that the said parcel is free from incumbrances, except a mortgage made by Herman

Aaron to Julia Cudney, dated the 14th day of July, 1906, on which there is unpaid the sum of \$755.

Second: That pursuant to chapter 724 of the Laws of 1905 and the acts amendatory thereof, the city of New York has taken the said parcel for the purposes mentioned in the said act.

Third: That the acts of the city of New York, under and pursuant to the said act, have greatly damaged claimant, and claimant, therefore, asks for a hearing in support of the said claim, and that he be awarded just and equitable compensation therefor, together with his costs, compensation for his witnesses, disbursements and an allowance of 5 per cent. on the amount of the award, together with interest from the 22d day of July, 1907.

JEROME H. BUCK,
Attorney for Claimant.

Report of Commissioners.

(Title.)

We, James Jenkins, of the city of Kingston, county of Ulster and State of New York; Joseph D. Baucus, of the city and county of New York, and Peter C. Black, of the town of Ulster, county of Ulster and State of New York, duly appointed commissioners of appraisal by an order of the Supreme Court in the above-entitled proceeding, dated June 29, 1907, to ascertain and appraise the compensation to be made to the owners and all persons in any manner interested in the real estate laid down on the map in this proceeding, filed in the office of the clerk of the county of Ulster, on the 13th day of May, 1907, as proposed to be taken, acquired or affected for the purposes indicated in chapter 724 of the Laws of 1905, and the acts amendatory thereof, and to exercise and discharge all the powers and duties conferred upon such commissioners by said acts, and, without unnecessary delay, to ascertain and determine the compensation which ought justly to be made by the city of New York to the owners or the persons interested in the real estate, or any right, title, interest, term, easement or privilege pertaining thereto sought to be acquired, affected or extinguished by this proceeding, and to any owner or person interested in the real estate contiguous or adjacent thereto in any way affected by the taking of the said real estate, or the taking or extinguishing of any interest therein, whether such adjacent or contiguous real estate is shown on the plan or plans, map or maps or not, and upon such ascertainment and determination from time to time, to report the same to the court, as provided in said act, do respectfully report as follows:

That on the 22d day of July, 1907, we, the commissioners aforesaid, took and subscribed the oath required by the constitution, and that we held the first meeting of this commission at the County Court House, in the city of Kingston, Ulster county, New York, on the 22nd day of July, 1907, at two o'clock in the afternoon, as directed by the order of this court.

That on the 22nd day of July, 1907, the oath of the commissioners was duly filed in the office of the clerk of the county of Ulster, and a certified copy thereof filed in the office of the clerk of the county of New York on the 23rd day of July, 1907.

That we viewed the real estate laid down on the aforesaid map, including the parcels embraced in this report, and have carefully examined each parcel thereon shown, and thereafter heard the testimony and considered and examined the claims presented to us which are herein reported on, and considered proofs and allegations of the persons claiming to be entitled to or interested in so much of the real estate laid down on said map as is so reported on, and such proofs and allegations as have been offered on behalf of the city of New York.

That the testimony taken herein has been reduced to writing and is filed herewith, and we have annexed hereto a true copy of the map showing the parcels now reported on.

That after examining said claims, proofs, allegations and testimony and making said views and examinations, and carefully considering the same, we did, all being present, and without any unnecessary delay, ascertain and determine the compensation which ought justly to be made by the said city of New York to the owners of or persons interested in so much as is included in this report of the real estate sought to be acquired or affected by said proceedings.

A brief description of the several parcels here reported on, shown on the map as taken or affected by these proceedings; the respective amounts of the compensation ascertained and determined upon by us as aforesaid; a statement of the respective owners or persons entitled to or interested in the same, and the amounts which seem to us proper to be allowed as expenses and disbursements, including reasonable compensation for witnesses and counsel fees to such attorneys as have appeared before us for parties to these proceedings, are as follows:

PARCEL No. 273.

All that certain piece or parcel of real estate situated in the towns of Olive and Hurley, county of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 273, which parcel is described as follows: (Insert description.)

Seven thousand dollars (\$7,000) is the sum ascertained and determined by us as aforesaid to be paid to the owners of and persons interested in said real estate for the taking of the fee of said parcel, designated on said map as Parcel No. 273.

James P. McGovern is the owner of said parcel.

Francis Raymond is the owner of a mortgage covering this parcel for the sum of two thousand dollars (\$2,000) with interest at the rate of 5 per cent.

Jerome H. Buck appeared before us as attorney and counsel for said owner, and we recommend that the sum of eighty-nine dollars and sixty-two cents (\$89.62) be allowed him for expenses and disbursements, including reasonable compensation for witnesses, and a further sum of three hundred and fifty dollars (\$350) for counsel fees.

(Description of the other parcels reported on, and the awards made therefor by the commission.)

All of which is respectfully submitted.

Dated, Kingston, N. Y., *December 28, 1907.*

(Signature of Commissioners.)

Objections to Report.

(Title.)

James P. McGovern, the owner and claimant of Parcel No. 271A in section No. 7 of the Ashokan reservoir, excepts to the report of James Jenkins, Joseph D. Baucus and Peter C. Black, commissioners of appraisal herein, and objects to the confirmation of the said report on the following grounds:

1 That the award of \$3,800, made by the commissioners for this property, is grossly inadequate.

2. That the commissioners erred in striking out, and in refusing to consider the evidence of the witness, Cornelius C. Vermeule, an expert called by the claimant as to the value of this property for reservoir purposes.

3. That the commissioners excluded and did not consider in making their award proper and material evidence bearing on the market value of this property, showing that this property was part of a natural reservoir site, and its market value by reason of this fact was much enhanced.

4. That the commissioners erred in striking out and in refusing to consider evidence offered by the claimant to show the market value of this property as a part of a reservoir site.

5. That the commissioners erred in refusing to receive and consider evidence offered by the claimant to show the value of this property to the city of New York.

6. That by the erroneous theory of valuation adopted by the commissioners, claimant has been deprived of his property without due process of law and without just compensation, in violation of the United States Constitution,

7. That by the erroneous theory of valuation adopted by the commissioners, claimant has been deprived of his property without due process of law and without just compensation, in violation of the Constitution of the State of New York.

8. That the commissioners erred in failing to award to the claimant, the value of the land plus the value of the structures erected upon it.

9. That the words "just and equitable compensation" as used in the act under which this proceeding was instituted mean all loss, damage or expense direct or consequential suffered by the claimant, and the commissioners erred in refusing to so construe the said act.

10. That if the words "just and equitable compensation" do not include all loss, damage or expense, direct or consequential, suffered by the claimant, the act under which these proceedings are carried on is unconstitutional and violates article 1, section 1, and article 1, section 6, of the Constitution of the State of New York, in that it deprives this claimant of the equal protection of the laws, and deprives him of the rights and privileges secured to railroad corporations under section 13 of the act under which this proceeding is being carried on, and deprives claimant of his property without due process of law, and without just compensation, and also violates article 1 of the Fourteenth Amendment of the Constitution of the United States, for the same reason.

11. That the commissioners erred in failing to make compensation to the claimant for the rights he had to combine with the owners of those contiguous parcels of land, which together constituted a reservoir site, in offering for sale, using, or selling the whole of the said site to intending purchasers in the open market, and in thereby obtaining a greatly enhanced value for his property, and also for the rights which he had of combining with the said owners, in building or causing to be constructed a reservoir or reservoirs on all or parts of the said property, including this parcel of land, which rights were taken away by chapter 724 of the Laws of 1905, and the acts amendatory thereof and supplemental thereto, and particularly by section 3 of the said act, and by other provisions of the said laws.

12. That the commissioners erred in refusing to receive and consider evidence which was offered to show the most advantageous use to which this property could be put, and the said commissioners, in making their award, did not take into consideration, the most advantageous uses to which this property could be put.

13. That the commissioners erred in refusing to receive evidence to show the value of this property of the city of New York, as under chapter 724 of the Laws of 1905, and the acts amendatory thereof, every other person and corporation was prohibited from constructing a reservoir on the Ashokan reservoir site, of which this particular parcel of property was a necessary part, and the said commissioners erred in refusing to consider the aforesaid evidence in making their award.

14. That the commissioners made higher awards to other claimants than they made to this claimant, in proportion to the relative market value of the said properties, and discriminated against this claimant, in this particular.

15. That the commissioners erred in failing to allow to the claimant costs before and after notice of trial and a trial fee, as the city made no offer to purchase this property.

16. That if the commissioners of appraisal properly construed the act in refusing to permit costs before and after notice of trial, and a trial fee, the

act under which these proceedings were carried on is unconstitutional in that regard, in that it violates article 1, section 1, and article 1, section 6, of the Constitution of the State of New York, and article 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this claimant the equal protection of the laws, and deprives claimant of his property without due process of law and without just compensation, and it is also in violation of article 3, section 16 of the Constitution of the State of New York in that this is a local act, and embraces more than one subject, and these subjects are not expressed in the title.

WHEREFORE, claimant asks that the award herein may be set aside, and the court refuse to confirm the report of the said commissioners, and that the same may be sent back to the same commissioners or to other commissioners.

JEROME H. BUCK,
Attorney for Claimant.

Order Confirming Awards.

(Caption and title.)

On reading and filing the report, dated December 28, 1907, of James Jenkins, Joseph D. Baucus and Peter C. Black, who were appointed commissioners in the above-entitled matter, by an order of the Supreme Court, dated June 29, 1907, to estimate, ascertain and appraise the compensation to be made to the owners of, and all persons interested in, the real estate shown on the map of this proceeding, filed in the office of the clerk of the county of Ulster, on the 13th day of May, 1907, as Map No. 1, as proposed to be taken, acquired or affected for the purposes indicated in chapter 724 of the Laws of 1905, and the acts amendatory thereof, and to exercise and discharge all the powers and duties conferred on such commissioners by said acts, and without unnecessary delay to ascertain and determine the compensation which ought justly to be made by the city of New York to the owners of or persons interested in the real estate, or any right, title, interest, term, easement or privilege pertaining thereto, sought to be acquired, affected or extinguished by this proceeding, and to any owner or person interested in the real estate contiguous or adjacent thereto, in any way affected by the taking of such real estate, or the taking or extinguishment of any interest therein, whether such adjacent or contiguous real estate is shown on said map or not:

On reading due proof of the publication of the notice of the filing of said report, together with notice of the presentation of such report for confirmation to this court, at a Special Term, to be held in and for the third judicial district at the courthouse, in the city of Kingston, Ulster county, N. Y., February 15, 1908; and on reading and filing full proof of service of such report and notice of filing on the corporation counsel and the comptroller of the city of New York:

And it appearing from said report that on the 22d day of July, 1907, the commissioners took and subscribed the oath required by the Constitution, and that the first meeting of said commission was held at the courthouse, in the city of Kingston, on the 22d day of July, 1907, at two o'clock in the afternoon, as directed by the order of this court.

That on the 22d day of July, 1907, the oaths of the commissioners were filed in the office of the county clerk of the county of Ulster, and a certified copy thereof filed with the clerk of the county of New York, on the 23d day of July, 1907.

That they viewed the real estate laid down on the aforesaid map, including the parcels embraced in said report, and carefully examined each parcel shown thereon, and thereafter heard the testimony and carefully considered and examined the claims presented to them, and which are reported on in said report, and considered the proofs and allegations of the persons claiming to be

entitled to, or interested in so much of the real estate laid down on said map as is so reported on, and such proofs and allegations as were offered on behalf of the city of New York.

That the testimony taken was filed with their report and that they have annexed thereto a true copy of so much of said map as shows the parcels so reported on.

That after hearing such claims, proofs and allegations and testimony, and making said views and examinations, and carefully considering the same, they did, all being present, and without unnecessary delay ascertain and determine the compensation which ought justly to be made by the city of New York, to the owners of or persons interested in so much as is included in said report, of the real estate sought to be acquired or affected by said proceedings, and after hearing John J. Linson, counsel for the petitioner, in favor of the confirmation of said report; and Mr. Harrison T. Slosson, of counsel for the claimants to Parcels No. 295 (and others designated), who did not oppose confirmation; and Mr. A. T. Clearwater, of counsel for the claimants to Parcels No. 312 (and others), who did not oppose confirmation; and Messrs. A. C. & F. W. Hottenroth, of counsel for the claimants to Parcels No. 308 (and others) in opposition, as far as said report affects Parcels 308, 304 and 302, and Mr. Jerome H. Buck, of counsel for the claimants to Parcels Nos. 273 and 271A, in opposition to confirmation as far as said report affects said parcels: and no one else appearing in opposition to the confirmation of said report, and due deliberation having been had thereon,

Now, on motion of Francis Key Pendleton, corporation counsel of the city of New York, the petitioner, it is

Ordered, that said report of said commissioners, dated December 22, 1907, filed in the office of the clerk of the county of Ulster, on the 30th day of December, 1907, be and the same hereby is in all respects ratified, approved and confirmed, except as hereinafter specifically stated and set forth, and it is further

Ordered, that the respective amounts of compensation ascertained and determined by said commissioners and fixed by their report as far as the same effects Parcels No. 308 (and other parcels designated), except as herein-after specifically stated and set forth, be paid by the comptroller of the city of New York, with interest thereon as provided by law, to the persons respectively entitled thereto, and it is further

Ordered, that in any and all cases where the name or names of the owner or owners, person or persons interested in any real estate included in said report, shall not be set forth or mentioned, or where the said owner or owners, person or persons owning such parcels of real estate are unknown, or are not fully known, and where there are adverse or conflicting claims to the amounts awarded, as set forth in said report, the said comptroller of the city of New York shall pay the sum so mentioned in said report payable to said owner or owners, person or persons, with such interest as aforesaid, into the Farmers' Loan & Trust Company, New York city, to the credit of such parcels and subject to the further order of this court

A brief description of several parcels here reported on as taken or affected by these proceedings, the respective amounts of compensation payable to the persons entitled to be paid such amounts of compensation, so far as the same are known, being as follows:

(Insert description and awards.)

Enter:

JOHN D. FRATSER,
Clerk.

JAMES A. BETTS,
Justice Supreme Court.

Precedents in Proceeding Brought by a Municipal Corporation to Acquire, by Condemnation, Lands for a Public Park.

Petition.

SUPREME COURT — ALBANY COUNTY.

IN THE MATTER OF THE ACQUISITION OF
LANDS FOR THE PURPOSE OF A PUBLIC
PARK IN THE THIRTEENTH WARD.

To the Supreme Court of the State of New York:

The petition of the city of Albany by Philip Bender, superintendent of parks, respectfully shows to this honorable court:

First. That it is a city of the second class and that Philip Bender is superintendent of parks in said city.

Second. That the following is a specific description of the property situated in the thirteenth ward of the city of Albany, which is sought under these proceedings to be condemned, to wit: All those lands not owned by the city of Albany lying and being within the area bounded as follows: North by the south line of Spruce street; east by the west line of Swan street; south by the north line of Elk street, and west by the east line of Dove street.

Third. That heretofore and on the 20th day of April, 1908, the common council of the city duly passed an ordinance which was afterward and on the 5th day of October duly amended, authorizing and directing that the above-entitled property be acquired by the city for the purpose of a public park.

Fourth. That the following are the names of the owners of the property sought under these proceedings to be condemned, to wit: (Insert names.)

Fifth. That the city of Albany, through its superintendent of parks, by law duly authorized, has been unable to agree with the owners in regard to the value of said property, as the city claims that said property should be sold for its market value and the owners thereof demand a price far in excess of the same.

Sixth. That the value of the property based upon its assessed valuation is as follows: Property of (Give names of owners and valuations).

Seventh. That it is the intention of your petitioner in good faith to proceed with diligence in the acquisition of said land to convert the same into a public park wherein the numerous residents of the section sought to be benefited shall have an open space conducive to good health and public morals, and that all the necessary preliminary steps required by law have been taken to entitle your petitioner to institute this proceeding.

WHEREFORE, your petitioner respectfully demands that it may be adjudged that the public health and public morals require the condemnation of the real property hereinbefore described and that your petitioner is entitled to take and hold such property henceforth for the public use hereinbefore set forth upon making due compensation therefor to the owners.

Your petition prays further that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken and as in duty bound your petitioner will ever pray, etc.

Dated, Albany, N. Y., July 9, 1909.

(Add verification.)

PHILIP BENDER,
Superintendent of Parks.

Notice.

(Title.)

Notice is hereby given that under and pursuant to the provisions of an ordinance duly passed at a regular meeting of the common council of the city of Albany on the 20th day of April, 1908, and afterward amended on October 5, 1908, which said ordinance was thereafter duly approved by the

mayor and by the board of estimate and apportionment, an application will be made at an adjourned Special Term of the Supreme Court to be held at chambers in the City Hall in the city of Albany on the 28th day of July, 1909, at ten o'clock A. M., on that day or as soon thereafter as counsel can be heard for the appointment of commissioners to inquire into and determine what damages and compensation the owner or owners of lands to be taken, as hereinafter described, or persons interested therein, will be entitled to for the same. The following is a description of the lands sought to be acquired in this proceeding: All those lands not owned by the city of Albany lying and being within an area bounded as follows: North by the south line of Spruce street; east by the west line of Swan street; south by the north line of Elk street, and west by the east line of Dove street.

Dated, *July 12, 1909.*

ARTHUR L. ANDREWS,

(Add proof of publication.)

Corporation Counsel.

Order Appointing Commissioners.

(Caption and title.)

Upon reading and filing the petition of the city of Albany by Philip Bender, superintendent of parks, praying for the condemnation of certain lands in the city of Albany for a public purpose, and for the appointment of commissioners of appraisal to ascertain the compensation to be made to the owners for the property so taken, and it further appearing that publication of a notice of this application has been duly made according to law, in the two official newspapers published in the said city of Albany, to wit, the Albany Evening Journal and the Press-Knickerbocker-Express, and due proof of such publication having been made and filed,

Now, on motion of Arthur L. Andrews, corporation counsel of the city of Albany, and attorney for the petitioner herein, and after hearing (recite appearances), it is

Ordered, that Henry E. Stern, John Wallace and Jacob C. E. Scott, all of the city of Albany, be, and they hereby are, appointed commissioners to inquire into and to determine and award such damages and compensation to the owners of or persons interested in such lands to be taken as they severally will be entitled to for the same, and are clothed with such powers as, by law, are conferred upon them. Enter: GEORGE H. FITTS,

Justice Supreme Court.

Oath of Commissioners.

(Title.)

COUNTY OF ALBANY, }
CITY OF ALBANY, } ss.:

We, the undersigned, designated and appointed, by the Hon. George H. Fitts, a justice of the Supreme Court, commissioners to inquire into and to determine and award such damages and compensation to the owners of or persons interested in such lands to be taken as they severally shall be entitled to for the same in the above-entitled proceeding, do solemnly swear that we will faithfully perform the duties of such commissioners, and of said office, to the best of our understanding and ability, and each of us, for himself, so swear.

(Jurat.)

(Signature of Commissioners.)

Report of Commissioners.

To the Supreme Court of the State of New York:

The undersigned commissioners appointed by an order of this court made at an adjourned Special Term thereof, held at Supreme Court chambers in the city of Albany on the 28th day of July, 1909, to inquire into and to determine and award such damages and compensation to the owners of or persons interested in the lands to be taken as they severally were entitled to for the same, do hereby respectfully report.

That we met at the Special Term room in the City Hall in the city of Albany, on the 25th day of August, 1909, at ten o'clock A. M., that being the time duly designated for our first meeting, having first severally taken and subscribed the oath required by law.

The commission organized by the selection of Henry E. Stern as chairman and proceeded to view the premises described in the petition herein and to hear the proofs and allegations of the several parties.

That the property intended to be taken in this proceeding is as follows: All those lands not owned by the city of Albany lying and being within an area bounded as follows: North by the south line of Spruce street; east by the west line of Swan street; south by the north line of Elk street, and west by the east line of Dove street.

A map of said premises is filed herewith.

That after viewing the premises, hearing the proofs and allegations of the parties, and Mr. Neile F. Towner of counsel for Orr & Keating Corporation, Mr. Henry S. McCall of counsel for Catherine S. Lansing, Mr. Peter A. Delaney of counsel for Bradbury Dyer, Mr. Frank R. Keeshan of counsel for Anna M. Keeshan, Dennis J. Keeshan and Frank R. Keeshan, Mr. H. J. Crawford of counsel for Virginia C. Hendrick, and Mr. Arthur L. Andrews, corporation counsel, in behalf of the city, and having reduced the testimony taken to writing, which is herewith submitted, and after due deliberation and consultation thereon, we have ascertained and determined and do hereby find that the compensation be awarded to the owner or owners or persons interested in the lands herein sought to be taken and to which they are severally entitled is as follows:

To Dennis J. Keeshan, owner of lots Nos. 107, 113, 129, 131 Elk street; Nos. 140, 146, 166 Spruce street; No. 12 Dove street.....	\$27,000
To Anna M. Keeshan, owner of lots Nos. 103, 109, 111 Elk street; 138 and 144 Spruce street.....	10,500
To Catherine S. Lansing, owner of lots Nos. 85 and 97 Elk street and 118 and 130 Spruce street.....	2,600
To Bradbury Dyer, owner of lots No. 89 Elk street, No. 122 Spruce street and building on lot No. 97 Elk street.....	4,400
To Orr & Keating Corporation, a copartnership composed of Thomas B. Keating and Robert Orr, as owners of lots Nos. 42, 44 and 46 Swan street	750
To Jane Cromme, owner of lot No. 110 Spruce street.....	125
To Virginia C. Hendrick for her interest in all the property sought to be taken in this proceeding.....	200
To Frank R. Keeshan, owner of lots Nos. 106, 108 Spruce street....	500

And we do further report that the remaining property mentioned and described in the petition in this proceeding has been acquired by the city of Albany.

We do further report that no other person has appeared before us and offered any evidence as to any other interest in or claim upon the property described in the petition herein and sought to be taken in this proceeding.

All the property above described has reference to the lot numbers on map of land to be acquired for proposed park made by Walter E. Melius, city engineer, and filed herewith.

The above awards include the lands, buildings, structures, appurtenances and rights.

The minutes of testimony taken by us in this proceeding are duly certified and submitted herewith.

The notice to owners and others interested in the property described in the petition with proof of due publication thereof is hereto annexed.

All of which is respectfully submitted.

Dated, *October*, 1909.

Notice of Hearing.

(Title.)

The undersigned, appointed in the above proceedings to inquire into and determine and award such damages and compensation to the owners or persons interested in such lands so to be taken, as they severally will be entitled to for the same, will hold their first meeting at the Special Term room in the City Hall in the city of Albany, on the 25th day of August, 1909, at ten o'clock in the forenoon of that day, for the purpose of inquiring into, determining and awarding such damages and compensation to the owners and all other persons interested in the property to be taken for the purpose of a public thoroughfare as they severally will be entitled to for the same, which said property has been heretofore described in the published notice for the appointment of the undersigned commissioners. All persons interested in any manner in the land to be taken for the purpose aforesaid are invited to be present.

Dated, Albany, N. Y., *July 28, 1909.*

(Signature of Commissioners.)

ARTHUR L. ANDREWS, *Corporation Counsel.*

(Add proof of publication.)

Notice of Presentation of Report.

(Title.)

The report of the commissioners who were duly appointed herein, pursuant to an order of the Supreme Court made at an adjourned Special Term thereof, held at the City Hall in the city of Albany on the 28th day of July, 1909, and thereafter duly entered in the Albany county clerk's office, having been made, notice is hereby given that said report will be presented to the Supreme Court at an adjourned Special Term thereof, to be held at chambers in the City Hall in the city of Albany on the 4th day of November, 1909, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in order that the court may take such action thereon and make such order pursuant to the provisions of section 7 of title 17 of chapter 298 of the Laws of 1883 as may seem to be proper in the premises.

Dated, *October 23, 1909.*ARTHUR L. ANDREWS,
Corporation Counsel.

(Add proof of publication.)

Order Confirming Report.

(Caption and title.)

It appearing to this court that heretofore and on the 28th day of July, 1909, an order was duly made upon the petition of Philip Bender, superintendent of parks of the city of Albany, and on that day entered in the clerk's office of Albany county appointing Henry E. Stern, John Wallace and Jacob C. E. Scott, commissioners to inquire into and determine and award such damages and compensation to the owners and persons in the lands in said petition designated to be taken for the purposes of a public park as would seem to them to be just and equitable; that notice of application for said order was duly published in the official newspapers of the city of Albany according to the statute in such case made and provided; that said commissioners thereafter took and filed the constitutional oath of office and caused a notice to be published in two daily newspapers published in the city of Albany and designated as the official newspapers, of their first meeting according to the statute in such case made and provided; that thereafter and from time to time the said commissioners duly heard the proofs and allegations of the parties in respect to the value of the lands sought to be taken.

That said land is bounded and described as follows: All those lands not owned by the city of Albany, lying and being within an area bounded as follows: North by the south line of Spruce street; east by the west line of Swan street; south by the north line of Elk street, and west by the east line of Dove street.

That said commissioners made their report in writing dated October 21, 1909, wherein they find and report that the owners and persons interested in the said lands and the amounts to be awarded to them respectively are as follows: (Insert names and amounts.)

A notice of motion for the confirmation of said report having been duly published according to law,

Now, on reading and filing said report and the evidence taken by said commissioners and proof of the publication of the several notices, and on motion of Mr. Arthur L. Andrews, corporation counsel of the city of Albany, and Mr. Frank R. Keeshan for defendants Anna M. Keeshan and others, it is

Ordered, that said report of Henry E. Stern, John Wallace and Jacob C. E. Scott, commissioners, dated Octobebr 21, 1909, be and the same hereby is in all things confirmed, and it is

Further ordered, that the amount of the award as made by said report, after deducting said sums, which may be due for taxes or water rates, be paid to the several persons therein respectively designated, where the titles to the premises for which the same is made are free and clear of all incumbrances whatsoever, and, if the title to any of the parcels of land so taken, and for which such award is made, is, at the time when the said award is payable, subject to any incumbrance, the amount of said award, or so much thereof as may be necessary, shall be paid to the party or parties holding the same according to their respective rights, or said award be deposited to their credit respectively, to be paid wholly or in part to such person or persons as shall by any future order of this court, or a judge thereof, upon notice to the corporation counsel of the city of Albany, be declared to be entitled thereto; and it is

Further ordered, that no other person has any interest in said land, or any part thereof; and it is

Hereby further ordered, that the comptroller of the city of Albany issue to the several parties entitled to the award certificates in writing, describing the property taken and the amount of such award and acknowledging indebtedness on the part of the city to the party therein named, in the amount of such award, and also stating that there is now on deposit in one of the city depositories, or in the office of the treasurer, subject to their order, the amount of such award.

GEORGE H. FITTS,

Justice Supreme Court.

Enter:

Notice of Application to Tax Expenses of Proceeding.

(Title.)

The report of the commissioners, who were duly appointed herein, having been confirmed by an order of the Supreme Court, made at an adjourned Special Term thereof, held at the City Hall in the city of Albany on the 4th day of November, 1909, and duly entered in the Albany county clerk's office, notice is hereby given that a statement of the costs, expenses and disbursements of the proceedings, including the compensation of said commissioners, will be presented to Hon. George H. Fitts, a justice of the Supreme Court, at his chambers in the City Hall in the city of Albany on the 20th day of November 1909, at nine o'clock A. M., or as soon thereafter as counsel can be heard, and a motion will be made that said costs, expenses and disbursements be taxed, and for such other and further order as to the court may seem just and proper.

Dated, Albany, N. Y., November, 5, 1909.

(Add proof of publication.)

ARTHUR L. ANDREWS,

Corporation Counsel.

(Title.)

Statement of costs, expenses and disbursements of the above-entitled proceedings, including the compensation of the commissioners appointed therein:

To the Press Company:

Publishing notice of application for appointment of commissioners	\$9 00
Publishing notice of first meeting	15 75
Publishing notice of motion to confirm report of commissioners.	15 75
Publishing notice of taxation of costs	10 50

To the Journal Company:

Publishing notice of application for appointment of commissioners	9 00
Publishing notice of first meeting	15 75
Publishing notice of motion to confirm report of commissioners.	15 75
Publishing notice of taxation of costs	10 50
Fees of Albany county clerk for making searches	150 00
Fees of Albany county treasurer for searches	25 00
Fees of witnesses as follows:	

James D. Wasson	1,500 00
Henry S. Fisher	50 00
Fee of Rogers, Ruso & Kelly, stenographers	75
Fee of Charles S. Moore, stenographer	75 75
Compensation of commissioners as follows:	
Henry E. Stern	200 00
Jacob C. E. Scott	200 00
John Wallace	200 00

Total	<u>\$2,503 50</u>
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(Verified by Corporation Counsel.)

Affidavit by Commissioner.

John Wallace, being duly sworn, deposes and says that he resides in the city and county of Albany, State of New York; that he was duly appointed by an order of this court at an adjourned Special Term thereof, held at chambers in the City Hall in the city of Albany, on the 28th day of July, 1909, one of three commissioners to inquire into and to determine and award such damages and compensations to the owners or to persons interested in certain lands in the city of Albany, N. Y., to be condemned and taken for a public purpose, as they might severally be entitled to for the same. That deponent duly acted as such commissioner in such proceedings and has performed his duties as such commissioner in taking and hearing testimony and in actual attendance at prearranged meetings, where adjournments subsequently were taken, in considering the testimony taken after the close thereof; in consultations with the other commissioners in said proceeding and in arranging, considering and discussing the final report of said commissioners and in considering and awarding proper damages and compensations to the owners of or persons interested in the lands acquired through such proceedings, this deponent was actually engaged during a part or the whole of twenty-two (22) days and as such commissioner this deponent is duly entitled to such compensation as is fixed by statute and may be allowed by this court for the sum total of twenty-two (22) days.

JOHN WALLACE.

(Jurat.)

(Add similar affidavit for each of the other commissioners.)

Order Taxing Costs and Expenses.*(Same title and caption.)*

On reading and filing proof of the due publication of notice of taxation of costs, expenses and disbursements in these proceedings, including the compensation of the commissioners and a statement thereof, duly verified, and after hearing Mr. Arthur L. Andrews, corporation counsel, for the petitioner and Mr. Frank R. Keeshan of counsel for Anna M. Keeshan and others, it is

Ordered, that the costs, expenses and disbursements of the proceedings be, and hereby are taxed and adjusted at twenty-five hundred and three dollars and fifty cents (\$2,503.50), and it is hereby

Further ordered, that there be allowed to the defendants Anna M. Keeshan and others for their costs, disbursements and allowances in these proceedings, the sum of five hundred dollars (\$500), the same to be paid to their attorneys.

Enter:

GEORGE H. FITTS,

Justice Supreme Court.

Precedents in Proceedings Brought by a Railroad Corporation to Acquire, by Condemnation, Land upon Which It Desires to Construct and Operate a Steam Railroad (South Buffalo Ry. Co. v. Kirkover, 86 App. Div. 55, 176 N. Y. 301).

Notice of Presentation of Petition.

SUPREME COURT — ERIE COUNTY.

THE SOUTH BUFFALO RAILWAY COMPANY

vs.

HENRY D. KIRKOVER AND EMMA J.
KIRKOVER, HIS WIFE, AND HENRY
KOONS.

To the Above-named Defendants:

You will please take notice that a petition, of which a copy is hereunto annexed, will be presented to a Special Term of the Supreme Court to be held at the City and County Hall in the city of Buffalo, on the 19th day of November, 1900, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and application then and there made for the relief demanded in such petition.

ROGERS, LOCKE & MILBURN,

Attorneys for Petitioner.

(Title.)

Petition.*To the Supreme Court:*

The petition of the South Buffalo Railway Company respectfully shows upon its information and belief:

That the name of your petitioner is The South Buffalo Railway Company; that it is a domestic corporation organized under the Railroad Law of the State of New York; that the principal place of business of your petitioner is the city of Buffalo, in the county of Erie and State of New York; that the names and places of residence of its principal officers and of its directors are as follows: (Insert names and addresses.)

That the object or purpose of the incorporation of your petitioner was to construct, maintain and operate a railroad from a point in the city of Buffalo southerly through the town of West Seneca, and thence through said town to a point near Blasdell in said town.

That your petitioner requires for use in the construction of its road certain premises situate within the town of West Seneca in the county of Erie, and desires to acquire the title thereto by condemnation.

That the following is a specific description of the property to be condemned: (Insert description.)

That the public use for which the property is required is for the construction, maintenance and operation of the railroad of your petitioner; that the same is embraced within its route as the same was laid down upon a map thereof, which was filed in the office of the clerk of the county of Erie, on the 17th day of August, 1900; and that your petitioner intends to construct its railroad upon the said property.

That the names and places of residence of the owners of the property are as follows:

That the defendant Henry D. Kirkover, who resides at Fredonia, in the county of Chautauqua and State of New York, is seized in fee of the said premises; and that the defendant Emma J. Kirkover is the wife of the said Henry D. Kirkover, and resides with him and possesses an inchoate right of dower in the said premises.

That the defendant Henry Koons, who resides at the city of Buffalo, in the county of Erie and State of New York, is, or claims to be, the equitable owner of an undivided one-half of the said premises.

That all of the said defendants are of full age.

That the plaintiff has been unable to agree with the owners of said property for its purchase and that the reason of such inability is because of the inability to agree upon the fair value thereof.

That the value of the property to be condemned is eight thousand dollars (\$8,000.)

That it is the intention of the plaintiff in good faith to complete the work or improvement for which the property is to be condemned, to wit, the construction and completion of its railroad thereon and throughout its entire line, and that all the preliminary steps required by law have been taken to entitle it to institute this proceeding.

WHEREFORE, your petitioner demands that it may be adjudged that the public use requires the condemnation of the real property hereinbefore described, and that the plaintiff is entitled to take and hold such property for the public use specified upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken, and that it may have such other relief in the premises as shall be proper.

THE SOUTH BUFFALO RAILROAD COMPANY,

(Add verification.)

By JOHN G. MILBURN,

A Director.

(Title and caption.) **Order Appointing Commissioners.**

On reading and filing the petition of the above-named plaintiff, the South Buffalo Railway Company, duly verified by John G. Milburn, a director in said company, on the 8th day of November, 1900, from which it appears that the plaintiff is a domestic corporation, organized under the Railroad Law of the State of New York; that the principal place of business of the petitioner is the city of Buffalo, in the county of Erie and State of New York; that the names and places of residence of its principal officers and of its directors are as follows: (Insert names and addresses of its officers and directors.)

That the object or purpose of the incorporation of the petitioner was to construct, maintain and operate a railroad from a point in the city of Buffalo southerly through the town of West Seneca, and thence through said town, to a point near Blasdell, in said town; that the petitioner requires for use in the construction of its road certain premises situated within the town of West Seneca, in the county of Erie, and desires to acquire the title thereto by condemnation; that the following is a specific description of the property to be condemned: (Insert description.)

That the public use for which the property is required is for the construction, maintenance and operation of the railroad of the petitioner; that

the same is embraced within its route as the same was laid down upon a map thereof, which was filed in the office of the clerk of the county of Erie, on the 17th day of August, 1900; and that the petitioner intends to construct its railroad upon the said property; that the names and places of residence of the owners of the property are as follows:

That the defendant Henry D. Kirkover, who resides at Fredonia, in the county of Chautauqua and State of New York, is seized in fee of the said premises; that the defendant Emma J. Kirkover is the wife of the said Henry D. Kirkover and resides with him and possesses an inchoate right of dower in the said premises; and that the defendant Henry Koons, who resides at the city of Buffalo, in the county of Erie and State of New York, is, or claims to be, the equitable owner of an undivided one-half of the said premises; that all of the said defendants are of full age; that the plaintiff has been unable to agree with the owners of the said property for its purchase, and that the reason of such inability is because of the inability to agree upon the fair value thereof; that the value of the property to be condemned is eight thousand dollars (\$8,000); that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned, to wit, the construction and completion of its railroad thereon and throughout its entire line, and that all the preliminary steps required by law have been taken to entitle it to institute this proceeding.

And it appearing that the said petition prays that it may be adjudged that the public use requires the condemnation of the real property hereinbefore described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor; and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners of the property so taken; and such petition and notice having been duly served upon the defendants, Henry D. Kirkover and Emma J. Kirkover; and the defendant, Henry Koons, having appeared herein; and such petition having heretofore been presented to a Special Term of the Supreme Court, held in and for the county of Erie, at the City and County Hall in the city of Buffalo, on the 19th day of November, 1900, at the opening of court on that day; and the matter having been thereupon duly adjourned until this day by consent; and the matter having this day come on to be heard;

Now, upon reading and filing the said petition and the notice annexed thereto, and served therewith; and after hearing Mr. John G. Milburn, of counsel for the plaintiff, Mr. Wilson S. Bissell, of counsel for all the defendants consenting thereto; and no answer having been interposed to said petition; and it appearing that the plaintiff is entitled to the relief demanded; upon motion of Rogers, Locke & Milburn, attorneys for the plaintiff, it is

Ordered and adjudged, that the prayer of the petition be granted, and that the public use requires the condemnation of the real property hereinabove described, and that plaintiff is entitled to take and hold said property for the public use hereinbefore specified, upon making compensation therefor; that Tracey C. Becker, George C. Laverack and Thomas T. Ramsdell, three competent and disinterested freeholders, who reside in the city of Buffalo, county of Erie and State of New York, be and they hereby are appointed commissioners to ascertain the compensation to be made to the owners for the said described real property to be taken for the public use hereinabove specified; and that the first meeting of said commissioners be held at the office of Rogers, Locke & Milburn, No. 28 Erie street, in the city of Buffalo, county of Erie, on the 27th day of December, 1900, at ten o'clock in the forenoon of that day.

Judgment signed this 26th day of December, 1900. Granted, December 26, 1900.

F. J. T.,
Clerk.

Report of Commissioners.

(Title.)

We, the undersigned, Tracey C. Becker, George E. Laverack and Thomas T. Ramsdell, commissioners appointed by order of this court, dated the 26th day of December, 1900, to ascertain the compensation to be made to the owners thereof for the real property described in said petition, as amended *nunc pro tunc* as of the 8th day of November, 1900, by an order of this court granted on the 24th day of December, 1900, do respectfully report as follows:

That pursuant to said order appointing said commissioners, they met at the office of Rogers, Locke & Milburn, Esqs., No. 28 Erie street, in the city of Buffalo, county of Erie, and State of New York, on the 27th day of December, 1900, that being the time and place named in said last-mentioned order for the first meeting of said commissioners to hear the parties and take the proofs herein; and having first taken their oaths of office as such commissioners, which said oath is hereto annexed, the plaintiffs appeared by Rogers, Locke & Milburn, Esqs., its attorneys, and the defendants by Bissell, Carey & Cooke, Esqs., their attorneys, and by consent of counsel for both parties, the proceedings were adjourned from time to time until September 4, 1901, when, being attended by counsel for both parties, they proceeded to view and on that day and subsequent days did view and carefully examine all the lands and premises described in said order and in the petition herein, and the lands and premises of which said lands and premises so described are a part and from which the same were to be taken in and by this action and proceeding; and that thereafter by consent of counsel for both parties said proceedings were from time to time adjourned, until the 4th day of November, 1901, at the office of Rogers, Becker, Messer & Groat, No. 403 Main street, in the said city of Buffalo, on which day and subsequent days, to which said proceedings were duly adjourned, they heard all the proofs and took all the evidence offered by the parties hereto, and caused the testimony taken by them to be reduced to writing, which testimony is filed with this report and made a part thereof; that, after the evidence was closed and counsel for the parties had discussed the same, they did deliberate thereon, and did carefully examine the said lands and premises, and did together to the best of their ability ascertain, determine and decide upon the amount of compensation to be paid to the parties defendant herein, the owners of the lands and premises aforesaid, and they do hereby respectfully report that the following named persons are those to whom such compensation should be paid, and that the sums to be paid to them are as follows:

To Henry D. Kirkover and Emma J. Kirkover, his wife, and Henry Koons, as and for compensation for the lands and premises aforesaid, which are actually taken in this action or proceeding, the sum of ten thousand five hundred dollars (\$10,500), and as compensation for the damages to the remainder of the parcel of land owned by said defendants, out of which the lands and premises described in said petition and order are taken, excluding therefrom, however, by consent of counsel for defendants, such portion of said lands as lie to the north and east of the right of way and lands and tracks of the Buffalo, Rochester & Pittsburgh Railway Company, as shown upon the maps and exhibits offered and received in evidence, caused by the taking of the parcel of land described in this proceeding and the use thereof for railroad purposes in the manner and to the extent shown by the evidence and proceedings aforesaid, the sum of forty-one thousand five hundred dollars (\$41,500), making a total appraisal and award to said defendant land-owners of the sum of fifty-two thousand dollars (\$52,000), as the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by your commissioners herein.

At the request of counsel for the defendants, we do further separately report, that in fixing and determining such compensation and award, your commissioners have taken into consideration the question whether the lands and premises of said defendants, not taken in this proceeding aforesaid, have been in any way damaged and depreciated in value by the construction and use and operation of the railroad of the plaintiff adjoining the lands of said defendants and beyond the boundary lines of the parcel taken herein, and they find and have determined that said lands and premises of said defendants not taken have not been, and will not be, in any way thereby damaged or depreciated; and at the request of counsel for plaintiff, they have also taken into consideration the question as to whether any allowance or deduction should be made from said compensation or account of any real or supposed benefits, which the defendant landowners have derived, or may derive, from the public use for which the property aforesaid is taken, or the construction of any proposed improvement connected with such public use, and they find and have determined that no such allowance or deduction should be made on account thereof, because there are no such, and will be no such real or supposed benefits derived by the landowners from such public use of the property taken or the construction of any proposed improvement connected with such public use.

The following is a specific description of the piece and parcel of land condemned and taken in this proceeding: (Insert description.)

All of which is respectfully submitted.

Dated, Buffalo, N. Y., *April 16, 1902.*

(Signed)

(Signature of Commissioners.)

(Title.)

Exceptions to Report.

SIRS:—You will please take notice that the plaintiff in the above-entitled action hereby excepts to that portion of the report of the commissioners heretofore made herein, bearing date the 16th day of April, 1902, as awards the defendants as compensation for the damages to the remainder of the parcel of land owned by said defendants out of which the lands and premises described in said petition and order are taken the sum of forty-one thousand and five hundred dollars (\$41,500), making an award to the defendants of the sum of fifty-two thousand dollars (\$52,000), as a compensation to be made by the plaintiff to the owners of the property appraised by the commission.

Said plaintiff also excepts to that portion of said report of said commissioners wherein and whereby they find and decide that the lands and premises of said defendants not taken in this proceeding have not been in any way damaged or depreciated in value by the construction and use and operation of the railroad of the plaintiff adjoining the lands of said defendants and beyond the boundary lines of the parcel taken herein; and wherein they find and decide that said lands and premises of said defendants not taken have not been and will not be in any way thereby damaged or depreciated.

Said plaintiff also excepts to that portion of the report of the commissioners herein, wherein and whereby they find and decide that no allowance or deduction should be made on account of any real or supposed benefits which the defendant landowners have derived or may derive from the public use for which the property aforesaid is taken, or the construction of any proposed improvement connected with such public use; and wherein and whereby they find and decide that there will be no such real or supposed benefits derived by the landowners from such public use of the property taken or the construction of any proposed improvement connected with such public use.

ROGERS, LOCKE & MILBURN,

To BISSELL, CAREY & COOKE,

Attorneys for Plaintiff, Buffalo, N. Y.

Attorneys for Defendants;

And to The Clerk of the County of Erie.

Notice of Motion for Confirmation of Report.

(Title.)

GENTLEMEN:—You will please take notice that upon the report of the commissioners heretofore duly made in this proceeding, dated the 16th day of April, 1902, and filed in the office of the clerk of the county of Erie on the 20th day of May, 1902, and upon all the papers and proceedings herein, a motion will be made at a Special Term of this court appointed to be held in and for the county of Erie, at the City and County Hall in the city of Buffalo, on the 26th day of May, 1902, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order of this court directing that the aforesaid report of the commissioners in this proceeding be in all respects ratified and confirmed, with costs to the defendants and against the plaintiff, and for such other, further and different relief in the premises as may be proper.

Yours, etc.,

BISSELL, CAREY & COOKE,

Attorneys for Defendants, Buffalo, N. Y.

To ROGERS, LOCKE & MILBURN,

Attorneys for Plaintiff, Buffalo, N. Y.

Order Confirming Commissioners' Report.

(Title and caption.)

The defendants above named having heretofore moved upon all the papers and proceedings herein for the confirmation of the report of the commissioners in this proceeding duly made on the 16th day of April, 1902, and filed in the office of the clerk of the county of Erie on the 20th day of May, 1902, with costs to the defendants against the plaintiff;

And the said motion having regularly come on to be heard at this term of court, Bissell, Carey & Cooke appearing as attorneys for the defendants, and Rogers, Locke & Milburn appearing as attorneys for the plaintiff;

And after hearing Mr. Wilson S. Bissell and Mr. James McC. Mitchell, of counsel for the defendants, in support of the defendant's application for the confirmation of the commissioners' report with costs, who present the aforesaid report together with the testimony taken on the hearing before the said commissioners; and after hearing Mr. John G. Milburn, of counsel for the plaintiff, in opposition thereto; and the defendants' costs having been duly adjusted at the sum of sixty-five dollars (\$65), and the court having duly granted the defendants an additional allowance of one thousand five hundred dollars (\$1,500), and the fees of the commissioners having been fixed as follows: George E. Laverack, two hundred and fifty dollars (\$250), Thomas T. Ramsdell, two hundred and fifty dollars (\$250), Tracey C. Becker, two hundred and sixty dollars (\$260);

Now, upon reading and filing the said report and testimony, and upon all the papers and proceedings herein, on motion of Bissell, Carey & Cooke, attorneys for the defendants, it is

Ordered, that the report of the commissioners in this proceeding, dated the 16th day of April, 1902, and filed in the office of the clerk of Erie county on the 20th day of May, 1902, be and the same hereby is in all respects ratified and confirmed; and it is

Further ordered and directed that the plaintiff, The South Buffalo Railway Company, pay to the defendants (naming them) the sum of fifty-two thousand dollars (\$52,000) together with interest thereon at the rate of 6 per cent. per annum from the 16th day of April, 1902, the date of the determination of the commissioners of the appraisal or award herein, as compensation to the said defendants for their property condemned by the plaintiff in this proceeding, pursuant to the said determination of the commissioners, and that upon payment of such compensation the plaintiff shall be entitled to

enter into the possession of the property condemned and take and hold it for the public use specified in the judgment heretofore entered in this proceeding; and it is

Further ordered and directed that in addition to the compensation specified the plaintiff, The South Buffalo Railway Company, pay the following sums to the commissioners herein as expenses of the proceeding: (Insert names and amounts paid); and it is

Further ordered and directed that the defendants Henry D. Kirkover, Emma J. Kirkover, his wife, and Henry Koons recover of and from the plaintiff, The South Buffalo Railway Company, the sum of fifteen hundred and sixty-five dollars (\$1,565), their costs and disbursements in this proceeding, as the same have been adjusted, and that execution issue therefor.

Granted, June 16, 1902.

PERRY E. WURST,
Special Deputy Clerk.

Precedents in Proceeding Brought by a Street Surface Railway Corporation to Acquire, by Condemnation, a Right, Interest or Easement, Sufficient for the Construction and Maintenance of an Electric Street Railway upon and over Lands Within the Boundaries of a City Street, Owned in Fee by Abutting Owners, Subject to the Easement Therein Held by the Municipality for Street Purposes (Schenectady Railway Co. v. Peck, 88 App. Div. 201).

Petition.

NEW YORK SUPREME COURT — SCHENECTADY COUNTY.

SCHENECTADY RAILWAY COMPANY,

PLAINTIFF,

vs.

KATHARINE K. PECK, HARRIET MUMFORD PECK, HANNAH HUNTINGTON PECK,

DEFENDANTS.

88 App. Div. 201.

To the Supreme Court of the State of New York:

The petition of the Schenectady Railway Company, the above-named plaintiff, respectfully shows to this court:

First. That the said Schenectady Railway Company is a domestic railroad corporation duly organized and existing under and in pursuance of the provisions of the Stock Corporation Law, and of chapter 565 of the Laws of 1890, of the State of New York, known as "The Railroad Law," as amended, and having its principal place of business in the city of Schenectady, N. Y., and now engaged in the business of construction, maintaining and operating a street surface railway for the conveyance of persons and property in the city and county of Schenectady and in the county of Albany, in the State of New York, and in other business duly authorized by law.

That the names and places of residence of its principal officers are as follows: (Insert names and addresses).

And the names and places of residence of its directors are as follows: (Names and addresses).

That the object or purpose of its incorporation is the construction, maintenance and operation of a street surface railroad in the cities and counties aforesaid, including a single track, branch or extension of its existing road from its present track at the junction of State street and Washington avenue, in the city of Schenectady in the State of New York, northerly through and along the surface of the street in said city known as Washington avenue, to

the Mohawk River bridge at the end of said avenue, and that it has duly extended its road by the filing of the proper certificates, and by taking and effecting all the other necessary proceedings and acquiring the necessary authority so as to extend its road over said Washington avenue, between the points aforesaid.

Second. That on or about the 21st of May, 1901, the common council of the city of Schenectady, by a resolution duly adopted on that day and approved by the mayor of the city of Schenectady, on the 22d day of May, 1901, granted its consent and the consent of said city to the construction, maintenance and operation by the plaintiff of its electric street surface railway upon Washington avenue, aforesaid, from State street to the Mohawk River bridge and opposite the premises hereinafter described.

That in proceedings duly had for that purpose, upon due notice to all persons entitled thereto, on or about the 12th day of November, 1901, an order was duly made by the Appellate Division of the Supreme Court of the State of New York of the Third Judicial Department confirming a report of commissioners duly appointed by said court to ascertain and report whether the said railway of the plaintiff ought to be constructed upon said Washington avenue (such commissioners in said report having determined that such railway ought to be constructed), and approving such use of said avenue.

That said order of said Appellate Division was thereafter on the 1st day of April, 1902, duly affirmed by the Court of Appeals of the State of New York.

Third. That by virtue of the power and authority so given as aforesaid the plaintiff heretofore commenced the construction of its railroad on Washington avenue aforesaid from State street to the Mohawk River bridge.

Fourth. That soon after the plaintiff commenced the construction of its said road on Washington avenue, and the defendants Katharine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck commenced an action in this court against the plaintiff to restrain the construction and operation of its said road upon a certain part of said Washington avenue, which adjoins and abuts upon the house and premises situate on the westerly side of said avenue, owned by said defendants, and described as follows: (Insert description).

Upon the ground that such description conveyed, and that plaintiffs in said action owned, the fee to the roadbed to the center line of said Washington avenue opposite said premises, and that the construction and operation of said railroad upon that part of said roadbed lying between said center line and the premises above described would be an additional burden upon such fee.

That such proceedings were had in such action that a judgment was finally rendered therein, adjudging and determining the fee of that part of the roadbed of said avenue above mentioned, and restraining this plaintiff from constructing and operating its railroad upon such part of said roadbed until it had obtained the right to do so by condemnation or otherwise.

Fifth. That because of said judgment the plaintiff, in the construction of its railway upon said avenue opposite the premises above described, did not construct the same over that part of said street, the fee of which was adjudged in said action to belong to the plaintiffs therein.

That it is necessary for the proper operation of said railway that the same should be constructed over that part of the street opposite said premises of said Katharine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck, and that the plaintiff should acquire a right, interest or easement, sufficient for the construction, maintenance and operation of a single track electric street surface railway in said strip of land, which is a part of the

roadway of said Washington avenue, which is the public use for which said land is required.

That the following is a specific description and the location by metes and bounds of said land, namely: (Insert description).

Sixth. That, as determined by the said judgment aforesaid as to this plaintiff, the defendants Katharine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck, were, and they now are, the owners of and in possession of the said premises above described.

That all of said persons reside in said city of Schenectady and all of them are of full age, and that none of them are incompetent persons.

Seventh. That your petitioner, the Schenectady Railway Company, has endeavored in good faith to purchase from said Katharine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck, their interest in the right or easement in said parcel of land above described, required for the purposes aforesaid, and has offered to pay therefor its actual value and more, but has been unable to agree with them for said purchase for the reason that they absolutely refuse to sell to the plaintiff the said easement.

Eighth. That as plaintiff is informed and believes, the value of the easement aforesaid, to be condemned, is the sum of six cents.

Ninth. That it is the intention of the plaintiff, in good faith, to complete the work or improvement for which said property is to be condemned; and that all the preliminary steps required by law have been taken by it to entitle it to institute these proceedings, and that such right is required for the public use of a right of way for a street surface railroad corporation.

Tenth. That your petitioner has duly done and performed each of the several acts and things, as to notice and otherwise, required by law and the statute, as a preliminary or condition to the right to have and maintain these proceedings.

WHEREFORE, the plaintiff demands that it may be adjudged that the public use requires the condemnation of the aforesaid real property herein described, and that the plaintiff is entitled to take and hold such property for the public use specified upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Dated, *May 23*, 1903.

(Add verification.)

SCHENECTADY RAILWAY COMPANY,

By HINSBILL PARSONS,

President.

Notice of Presentation of Petition.

(Title.)

To the Defendants Above-named:

You are hereby notified that the annexed petition will be presented at a Special Term of the Supreme Court to be held at the chambers of Spencer, J., in the city of Gloversville, on the third Saturday of June (the 20th), 1903, at the opening of the court on that day, or as soon thereafter as counsel can be heard, to the end that such action may be taken thereon as may be proper.

Dated, *June . . .*, 1903.

Yours, etc.,

HUN & PARKER,
Attorneys for Petitioner.

Answer to Petition.

(Title.)

The defendants, for answer, to the petition, upon information and belief:

1. Deny any knowledge or information sufficient to form a belief as to the facts alleged in division "III" of the petition.

Deny that the plaintiff commenced the construction of its road on Washington avenue until after the decision of the Court of Appeals hereinafter mentioned.

2. Allege that the complaint and the judgments of the Special Term and the Court of Appeals in the action mentioned in the petition are in the words and figures as annexed and deny every other allegation in the petition about that action, except that it was brought, prosecuted and went to the Court of Appeals.

3. Deny that it is necessary for the proper operation of said railway that it should be constructed on the part of the street in question, but admit that it is necessary for the operation of an extension on Washington avenue, if such extension there be.

4. Deny that any of the defendants resides in the city of Schenectady and allege that they all reside in the city of New York.

5. Deny the facts alleged in division "VIII."

WHEREFORE, they ask that the petition be dismissed.

EDWARD WINSLOW PAIGE,

Attorney for Defendants.

(Add verification.)

Findings of Fact and Conclusions of Law, with Direction for Judgment, by the Court, at Special Term.
(Title.)

The above-entitled matter coming on to be heard at a Special Term of the Supreme Court of the State of New York, held at the city of Gloversville, Fulton county, on the 20th day of June, in the year 1903, upon due notice that the petition would be presented at this term of the court, with admission of service thereof by Edward Winslow Paige, Esq., attorney for the defendants Katherine K. Peck and others, on said petition of the Schenectady Railway Company, verified the 23d day of May, 1903, and on the answer of the defendants Peck, it being conceded that the only question at issue was the question as to the power of the court to adjudge that condemnation be made of the premises described in said petition, and that in case such issue of law be determined in favor of the petitioner, the Schenectady Railway Company, that the damages to be paid for the condemnation of such property be, and it was stipulated that the same are, the sum of six cents, and that final judgment to that effect might be entered in all respects in the same manner as if such sum had been awarded by a commission appointed in this proceeding, and after hearing Marcus T. Hun, Esq., on behalf of the Schenectady Railway Company, the petitioner, and Edward Winslow Paige, Esq., on behalf of the defendants, and after due deliberation had, I do find as matters of fact:

1. That the said Schenectady Railway Company is a domestic railroad corporation duly organized and existing under and in pursuance of the provisions of the Stock Corporation Laws, and of chapter 565 of the Laws of 1890 of the State of New York, known as "The Railroad Law," as amended, and having its principal place of business in the city of Schenectady, N. Y., and now engaged in the business of constructing, maintaining and operating a street surface railway for the conveyance of persons and property in the city and county of Schenectady and in the county of Albany, in the State of New York, and in other business duly authorized by law.

That the names and places of residence of the principal officers are as follows: (Insert names and addresses).

And the names and places of residence of its directors are as follows: (Insert names and addresses).

That the object or purpose of its incorporation is the construction, maintenance and operation of a street surface railroad in the cities and counties aforesaid, including a single track, branch or extension of its existing road from its present track at the junction of State street and Washington avenue in the city of Schenectady in the State of New York, northerly through and

along the surface of the street in said city known as Washington avenue, to the Mohawk River bridge, at the end of said avenue, and that it has duly extended its road by the filing of the proper certificates, and by taking and effecting all the other necessary proceedings and acquiring the necessary authority so as to extend its road over said Washington avenue between the points aforesaid.

2. That on or about the 21st day of May, 1901, the common council of the city of Schenectady, by a resolution duly adopted on that day and approved by the mayor of the city of Schenectady on the 22d day of May, 1901, granted its consent and the consent of said city to the construction, maintenance and operation by the plaintiff of its electric street surface railway upon Washington avenue aforesaid, from State street to the Mohawk River bridge and opposite the premises hereinafter described.

That in proceedings duly had for that purpose, upon due notice to all persons entitled thereto, on or about the 12th day of November, 1901, an order was duly made by the Appellate Division of the Supreme Court of the State of New York of the Third Judicial Department, confirming a report of commissioners duly appointed by said court, to ascertain and report whether the said railway of the plaintiff ought to be constructed upon said Washington avenue (such commissioners in said report having determined that such railway ought to be constructed) and approving such use of said avenue.

That said order of said Appellate Division was thereafter on the first day of April, 1902, duly affirmed by the Court of Appeals of the State of New York.

3. That soon thereafter the Schenectady Railway Company threatened to commence the construction of its said road on Washington avenue, and thereupon the defendants Katherine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck commenced an action in this court against it to restrain the construction and operation of its said road upon a certain part of said Washington avenue, which adjoins and abuts upon the house and premises situate on the westerly side of said avenue owned by said defendants and described as follows: (Insert description).

That such proceedings were had in such action that a judgment was finally rendered therein, adjudging and determining that the said defendants were the owners of the fee of that part of the roadbed of said avenue above mentioned, and restraining the Schenectady Railway Company from constructing and operating its railroad upon such part of said roadbed, which judgment was subsequently modified on appeal to the Court of Appeals "by adding thereto a provision that if the defendant shall require a right to the use of the land in question for street railway purposes the judgment shall not be regarded as effective to restrain it from entering upon such premises for the purpose of building, maintaining and operating its railroad thereon, and as so modified the judgment must be affirmed, with one bill of costs to the plaintiffs."

4. That the Schenectady Railway Company, after the decision of the Court of Appeals in *Peck v. Schenectady Railway Company*, hereinbefore mentioned, commenced the construction of its roadbed on Washington avenue aforesaid, from State street to the Mohawk River bridge.

5. That, because of such judgment, the Schenectady Railway Company, in the construction of its railway upon said avenue opposite the premises above described, did not construct the same over that part of said street, the fee of which was adjudged in said action to belong to the plaintiffs in said action.

That it is necessary for the proper operation of said railway that the same should be constructed over that part of the street opposite said premises of said Katherine K. Peck, Harriet Mumford Peck and Hannah Huntington

Peck, and that the plaintiff should acquire a right, interest or easement sufficient for the construction, maintenance and operation of a single-track electric street surface railway in said strip of land, which is a part of the extension of said roadway on said Washington avenue which is the public use for which said land is required.

That the following is a specific description and the location by metes and bounds of said land, namely: (Insert description).

6. That, as determined by the said judgment aforesaid as to the Schenectady Railway Company, the defendants (naming them) were, and they now are, the owners of and in possession of the said premises above described.

That all of said persons reside in said city of New York and all of them are of full age and that none of them are incompetent persons.

7. That the Schenectady Railway Company has endeavored in good faith to purchase from said Katherine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck, their interest in the right or easement in said parcel of land above described, required for the purposes aforesaid, and has offered to pay therefor its actual value and more, but had been unable to agree with them for said purchase for the reason that they absolutely refuse to sell to the plaintiff the said easement.

8. That it is the intention of the Schenectady Railway Company, in good faith, to complete the work or improvement for which said property is to be condemned; and that all the preliminary steps required by law have been taken by it to entitle it to institute these proceedings, and that such right is required for the public use of a right of way for a street surface railroad corporation.

9. That the Schenectady Railway Company has duly done and performed each of the several acts and things as to notice and otherwise, required by law and the statute, as a preliminary or condition to the right to have and maintain these proceedings.

I find, as conclusions of law:

First. That the Schenectady Railway Company is entitled to the relief demanded in the petition, and that the condemnation of the real property described in the petition is necessary for the public use, and that the Schenectady Railway Company is authorized by law, and is entitled to take and hold said property for the public use specified in the petition upon making compensation therefor.

Second. That the parties to this action having agreed and stipulated that in case it should be decided that the Schenectady Railway Company is entitled to take such property, the damages to be paid for the condemnation of such property be the sum of six cents (\$.06) and that final judgment to that effect be entered in all respects in the same manner as if such sum had been awarded by a commission appointed in this proceeding.

It is further adjudged and decreed that said sum be, and it is hereby fixed and determined to be the compensation to which the defendants are entitled for the taking and holding of the real property mentioned in the petition herein, to wit: (Description of property to be taken) for the public use specified in said petition, to wit: the construction, maintenance and operation of a street surface railroad and a branch or extension of its existing road over and upon the said premises above described, and that upon the payment thereof the Schenectady Railway Company shall be entitled to enter upon the said premises and to construct, maintain and operate its railroad over and upon the same.

I direct that judgment be entered in accordance with the foregoing conclusions of law.

Dated, *July 14, 1903.*

EDGAR A. SPENCER,
Justice Supreme Court.

Final Order and Judgment.

(Caption and title.)

The above-entitled proceeding having been brought to a hearing upon due notice thereof at a Special Term of the Supreme Court, held at the city of Gloversville, Fulton county, N. Y., before Mr. Justice Spencer, on the 20th day of June, 1903, and Marcus T. Hun, Esq., having been heard on behalf of the Schenectady Railway Company in support of the prayer of the petition herein, and Edward Winslow Paige, Esq., on behalf of Katharine K. Peck, Harriet Mumford Peck and Hannah Huntington Peck in opposition thereto, and the said court having thereafter made and filed its decision in writing, bearing date the 14th day of July, 1903, granting the prayer of the petition, and directing judgment as follows:

Now, on motion of Hun & Parker, attorneys for the Schenectady Railway Company, it is

Ordered, adjudged and decreed, that the Schenectady Railway Company is entitled to the relief demanded in the petition, and that the condemnation of the real property described in the petition is necessary for the public use, and that the Schenectady Railway Company is authorized by law, and is entitled to take and hold said property for the public use specified in the petition upon making compensation therefor.

And it appearing that the parties to this action have agreed and stipulated that, in case it should be decided that the Schenectady Railway Company is entitled to take such property, the damages to be paid for the condemnation of such property be the sum of six cents (\$.06), and that final judgment to that effect be entered in all respects in the same manner as if such sum had been awarded by a commission appointed in this proceeding. It is

Further ordered, adjudged and decreed, that said sum of six cents (\$.06) be, and it is hereby fixed and determined to be, the compensation to which the defendants are entitled for the taking and holding of the real property mentioned in the petition herein, to wit: (Description of property), for the public use specified in said petition, to wit: the construction, maintenance and operation of a street surface railroad and a branch or extension of its existing road over and upon the said premises above described, and that upon the payment therein the Schenectady Railway Company shall be entitled to enter into the possession of the said premises to construct, maintain and operate its railroad over and upon the same, and to take and hold the same for such public use.

JAMES B. ALEXANDER,
Clerk.

CONTEMPT.

ARTICLE.

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II. CIVIL AND CRIMINAL CONTEMPTS DISTINGUISHED. Judiciary Law, § 754, 678.

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III. CRIMINAL CONTEMPTS AND THEIR PUNISHMENT. Judiciary Law, §§ 750-752, 755; Penal Law, §§ 39, 600, 1939; Crim. Code, §§ 242, 243, 349, 350, 619, 635, 952, 683.

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The Consolidated Statutes have transferred to the Judiciary Law the provisions contained in the Code with reference to contempts. Article 19 of the Judiciary Law, §§ 750 to 781, inclusive, contain provisions of the Code of Civil Procedure, §§ 8, 9, 10, 11, 12, and 14, and 2266 to 2292, inclusive.

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ARTICLE I.

CONTEMPT DEFINED AND POWER OF THE COURT TO PUNISH THEREFOR.

Blackstone says: "Contempts are either direct, which openly insult or resist the powers of the court, or the person of the judges who preside there, or else are consequential, which, without such coarse insolence or direct opposition, plainly tend to create a universal disregard of their authority." 4 *Bl. Com.* 283.

The known existence of such a power prevents, in a thousand instances, the necessity of exerting it; and its obvious liability to abuse is, perhaps, a strong reason why it is so seldom abused. This power extends not only to acts which directly and openly insult or resist the powers of the court, or the persons of the judges, but to *consequential, indirect, and constructive contempts*, which obstruct the process, degrade the authority, or contaminate the purity of the court. 4 *Bl. Com.* 280; 2 *Hawks. b.* 2, c. 22; 1 *Com. Dig. Attachment, A.* The officers of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence, or abuse in their official capacity. 1 *Bac. Abr., tit. Attachment*; 2 *Hawk, tit. Attachment*; 3 *Atk.* 563.

A contempt of court is disobedience to the court, by acting in opposition to the authority, justice, and dignity thereof." 9 *Cyc.* 5.

In its broad sense a contempt is a disregard of, or disobedience to, the commands of a public authority, legislative or judicial, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence, or so near thereto as to disturb its proceedings or impair the respect due to its authority. *Am. & Eng. Enc. of Law*, vol. 7, p. 27.

Contempt is disorderly, contemptuous, or insolent language or behavior in the presence of a legislative or judicial body, tending to disturb its proceedings, or impair the respect due to its authority, or a disobedience to the rules or orders of such a body, which interferes with the due administration of law. *Amer. & Eng. Enc. of Law* (1st ed.), vol. 3, p. 777, citing *Anderson v. Dunn*, 6 Wheat. 204; *Burdett v. Abbott*, 14 East, 1; *Wharton's Crim. Law*, § 3426. It is said in *Matter of Yates*, 4 Johns. 338, that, "It is undoubtedly essential to the due administration of justice that all courts should have power sufficient to enforce obedience to their own orders; hence the necessity of authorizing them to punish contempt, a power resulting from the first principles of judicial establishments, in the constitutional exercise of which they ought to be protected." In *Yates v. Lansing*, 9 Johns. 394, at p. 416, the following language is found in the opinion of a member of the court: "The right of punishing for contempts by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence.

"It is a branch of the common law, adopted and sanctioned by our State Constitution. The discretion involved in this power is, in a great measure, arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice."

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. . . . The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. *Bessette v. Conkey Co.*, 194 U. S. 324, quoting from *Ex parte Robinson*, 19 Wall. 510. Any person who interferes with the process or control or action of the court in a pending litigation unlawfully and without authority is guilty of a civil contempt if his act defeats, impairs, impedes, or prejudices the right or remedy of a party to such action or proceeding. *King v. Barnes*, 113 N. Y. 479; *Lowenthal v. Hodge*, 120 App. Div. 304 (308).

Independent of authority granted by statute, courts of record of superior jurisdiction, whether civil or criminal, possess inherent power to punish for contempt of court. Such power is essential to the due administration of justice, and the Legislature cannot take it away or abridge it, although it may regulate its use. Statutes conferring the power are simply declaratory of the common law. 9 Cyc. 27.

The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection and to the due administration of justice; and statutes conferring on courts of justice the right

to punish for contempt are regarded as merely declaratory of the necessarily inherent powers possessed by them at common law. *Am. & Eng. Enc. of Law*, vol. 7, pp. 30-32.

The courts have power to punish, by fine or imprisonment, at their discretion, misbehavior in their presence, or misbehavior so near thereto as to obstruct the administration of justice. *Savin, Petitioner*, 131 U. S. 267.

A contempt is an offense against the court, as an organ of public justice, and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, or indictment, or not. To challenge a Senator or a judge may, under circumstances, be a contempt, but is certainly indictable. A conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment. The offense may be double; and so is the remedy and the punishment. For instance, assaults in the presence of the court, rescues, extortion, libels upon the court or its suitors relating to suits pending, forging a writ, etc., are indictable offenses, and certainly they are also contempts. The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection, and to the due administration of justice. The courts of justice of the United States are vested by the express statute provision with power to fine and imprison for contempt. *Anderson v. Dunn*, 6 Wheat. 204. See, also, *Ex parte Kearney*, 7 Wheat. 38. To fine for contempt, imprison for contumacy, enforcing the observances of order, etc., are powers which cannot be dispensed with in the court, because they are necessary to the exercise of all others. *United States v. Hudson*, 7 Cranch, 32.

The right of a court of record to punish contempts is a common-law right, and a necessary incident to the powers of the court. This is specially true of contempts committed in the presence of the court, and corporations, as well as individuals, are within the scope of its powers. *People v. Phelps*, 4 T. & C. 467; *Spaulding v. People*, 7 Hill, 301; *Wicker v. Dresser*, 13 How. 331; *Yates v. Lansing*, 9 Johns. 395; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171. The power to punish for contempt is, however, an exception to the provisions of the Constitution in favor of personal liberty, and cannot be extended in the least degree beyond the limits imposed by statute. *Rutherford v. Holmes*, 5 Hun, 317; aff'd, 66 N. Y. 368; *People v. Riley*, 25 Hun, 588. This summary right of the courts under the common law to punish a delinquent officer for disobedience to its lawful order has not been restricted by statute. *Clarke v. Binger*, 43 Super. Ct. 126; aff'd, 75 N. Y. 344; *People v. Dwyer*, 63 How. 115; *Stevenson v. Hanson*, 67 How. 305. The inferior courts have power at common law to protect their proceedings from disorder, to order the arrest and removal of disorderly persons, etc., and such order exonerates the per-

son executing it from liability for false imprisonment. *Matter of Watson*, 3 Lans. 408.

The power possessed by the court to punish for disobedience of its mandates is one of the safeguards for the due administration of justice, and is a necessary attribute of the court. The statute does not give a new power in this respect; it merely defines and limits an ancient rule of the common law. *People ex rel. Negus v. Dwyer*, 1 Civ. Pro. 484; aff'd, 27 Hun, 548, 90 N. Y. 402.

A judge out of court, however, has no power to punish for contempt on disobedience of an order made in a statutory proceeding before him, unless authority so to punish is expressly conferred by law. *People v. Brennan*, 45 Barb. 344. It has also been said that, on the other hand, the court in term time cannot punish, as for a contempt, disobedience of an order made by a judge out of court, unless the order is made in an action pending in the court. *People v. Brennan, supra*. But in *Tremain v. Richardson*, 68 N. Y. 617, it is held that the court has power to punish for a contempt of an order made by a county judge in supplementary proceedings in the Supreme Court. The right to process to punish for contempt is within the discretion of the court, and will not be exercised where there is another adequate remedy on behalf of a party, nor is its refusal reviewable by appeal. *Troy & B. R. R. Co. v. Hoosac Tunnel R. R. Co.*, 57 How. 181. The tendency of the courts has been in modern times to restrict the definitions of contempts and narrow their own powers in respect to them. *Bergh's Case*, 16 Abb. N. S. 266; *People v. Jacobs*, 66 N. Y. 8. The history of punishment for contempt is considered and discussed in *Dusenbery v. Woodward*, 1 Abb. 443.

Judge Delehanty in *Dollard v. Koronsky*, 64 Misc. 611, says at page 616, "There are four elements essential to the prosecution of contempts, and these are: 1. An offense within the definition of section 14 of the Code of Civil Procedure, or of the common law. 2. The operation of that offense to cause impairment, prejudice or defeat to rights and remedies of the adversary. 3. The further operation of that offense to cause actual loss or injury to the adversary. 4. That there be no other remedy for recoupment prescribed by law, which means, of course, statute law."

A proceeding to punish for contempt is a special proceeding, original in its character, and is independent of the proceeding in which the contempt arose. *Gibbs v. Prindle*, 11 App. Div. 470, citing *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *People ex rel. Grant v. Warner*, 51 Hun, 53. It is the disobedience of the order of the court, and not the failure to recognize the instrument by which it is enforced, that constitutes a contempt. *People ex rel. Platt v. Rice*, 80 Hun, 437, 62 St. Rep. 289, 30 Supp. 457; aff'd, 144 N. Y. 249.

While the common-law power to punish for contempt in civil cases exists both in England and in this State, yet we think that in both jurisdictions it exists to a more limited extent than formerly. While the cases in which the power may be invoked are not defined with precision, yet the power is no longer purely arbitrary and indefinite. From the very nature of the case, the instances in which the power may be exerted cannot be determined in advance, yet the principle which must be involved to induce the courts to act is clear. To justify the court in imposing punishment for contempt of court in any given case, it must be clear that the case is within the principle upon which the courts have from time immemorial acted. *Dollard v. Koronsky*, 67 Misc. 90 (95).

ARTICLE II.

CIVIL AND CRIMINAL CONTEMPTS DISTINGUISHED. Judiciary Law, § 754.

§ 754. Special proceeding to punish for contempt punishable civilly.

Sections seven hundred and fifty, seven hundred and fifty-one, and seven hundred and fifty-two, do not extend to a special proceeding to punish a person in a case specified in section seven hundred and fifty-three. In a case specified in section seven hundred and fifty-three, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offense must be punished as prescribed in the following sections of this article. (From §§ 12, 2266, Code Civ. Pro.)

The sections referred to by section 754, viz, sections 750, 751, and 752, relate to criminal contempts, and the method of punishment for that class of contempts is not the special proceeding provided for under section 753. There is no specific provision as to procedure in punishment for criminal contempts; but, as will be noted under that topic, it is assimilated to that for a civil contempt.

It was held in *King v. Flynn*, 37 Hun, 329, that the provisions of the Code prescribing punishments to be inflicted upon one guilty of a criminal contempt did not apply to a proceeding under the Code, section 874.

When a person fails or refuses to do something which he has been ordered to do for the benefit of the opposite party to the cause, the punishment, when by imprisonment, is for the purpose of coercing the performance of the act, or when by fine, it is usually for the purpose of having it go to the opposite party as an indemnity for the damages suffered by him on account of the failure of his adversary to comply with the order. In both of these cases the contempts are civil. *Am. & Eng. Enc. of Law* (2d ed.), vol. 7, p. 29.

A criminal contempt is conduct that is directed against the dignity and authority of the court. 9 Cyc. 6.

Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority. *Am. & Eng. Enc. of Law* (2d ed.), vol. 7, p. 28.

The dividing line between the acts constituting criminal and those constituting civil contempts becomes indistinct in those cases where the two gradually merge into each other. In those cases they have been classified and punished by the courts in some jurisdictions as criminal contempts, and by those in others as civil contempts. This, however, is largely a matter of definition. In most cases where they rest thus on the boundary line they are both, and so far as the rights of the contemnor are concerned may be punished as either. Their punishment as a civil contempt, in most instances, serves the double purpose of a private compensation to the opposite party and a public vindication of the power and dignity of the court. *Am. & Eng. Enc. of Law* (2d ed.), vol 7, p. 29.

As to what constitutes what is known as a criminal contempt, on the one hand, and a civil contempt upon the other, has been the cause of very much discussion in the opinions of the courts, and different rules are laid down as to what constitutes criminal contempt, or civil contempt, as well as different methods adopted for their punishment. As will be noted in further consideration of the subject, different procedure is had where the contempt is committed in view of the court from that which is to be followed where the contempt was not in the direct presence of the court. The distinction as between a civil and criminal contempt is shown in *People v. Cowles*, 4 Keyes, 38. Woodruff, J., in the opinion of the court, says: "The distinction between a commitment upon a precept issued for the disobedience of an order for the payment of a sum of money and a commitment upon a conviction of misconduct, punishable by fine and imprisonment, is very clearly indicated by the statute, and has been repeatedly declared by the courts. The proceedings are unlike, and the decision and penalties imposed are different." The distinction is plainly put in the further language of the court: "The process in the former case (civil contempt) is strictly and purely remedial; in the latter (criminal contempt) it is punitive, and in most instances purely so." A criminal contempt is one which tends to bring the administration of justice into disrepute, and where the guilty party is punished with a view to maintaining the dignity of the court. A civil contempt is, and can be used only, for the protection of individual rights, and for preventing a disobedience of the process of the court to the injury of a party to the proceeding. In *People ex rel. Negus v. Dwyer*, 90 N. Y., at p. 406, Finch, J., makes the same distinction: "The Revised Statutes distinguished and the Civil Code preserves the distinction between crimi-

nal contempts and proceedings as for contempt in civil cases." As respects disobedience to the orders of the court, the sole difference appears to be that a willful disobedience is a criminal contempt, while a mere disobedience, by which the right of a party to an action is defeated or hindered, is considered otherwise.

Proceedings to punish for contempt are of two kinds, each having a distinct object in view, the one to protect the rights of private parties, the other to protect the dignity of the court and to punish persons guilty of willful disobedience of the mandates. In the former case the purpose being to preserve private rights, it is immaterial whether the contempt was designedly or negligently committed, the power and duty of the court to redress the wrongs of the injured party are the same. If, for instance, a person transfer property or do any other act in disobedience of an injunction or other order, it can make no difference to the injured suitor whether it was done innocently or with evil intent. His loss is the same in either event, and proceedings to punish the offender with a view to adjusting the rights of the parties would look to indemnity only. Of course, if the disobedience was willful, the court could, at the same time that it enforced indemnity, inflict punishment for a criminal contempt; on the other hand, if the only purpose of the proceedings is to punish the prisoner and maintain the dignity of the court, the disobedience must be designed and willful, and hence the law terms this a criminal contempt. If, for example, one after examination wrongfully interpret and through this mistake disobey an order, the majesty of the law is not offended and the dignity of the court is not impaired, and as he is innocent of willful offense, the infliction of punishment could have no justification. The willful disobedience referred to in the statute relating to criminal contempt means conduct intentionally and designedly at variance with the mandate of the court. The disobedience need not be malicious, but it must be in pursuance of an intent to disregard the mandate of the violated order. *People v. Aitken*, 19 Hun, 327; cited, *Boon v. McGucken*, 67 Hun, 251.

The matter is very fully treated in *People ex rel. Munsell v. Court of Oyer and Terminer in the City of N. Y.*, 101 N. Y. 245, in which Judge Finch says, referring to civil contempt (p. 248, opinion): "If, in this class of cases, there exist traces of a vindication of public authority, they are but faint and utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperilled or indemnity for such rights defeated." At pages 247 and 248, Judge Finch defines the different kinds of contempt as follows: "In one class are grouped cases whose occasion is an injury or wrong done to the party who is a suitor before the court, and has established a claim upon its protection, and

which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute." *Code Civ. Pro.*, §§ 2284, 2285. A fine may be imposed to indemnify his actual loss. Where such is not shown, the fine must not exceed his costs and expenses and \$250 in addition thereto, and in both cases be paid over to the suitor. Further, page 248: "The second class of contempts consists of those whose cause and result are in violation of the rights of the public, as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases, if a fine is imposed, its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes which are violations of the public law and end in the vindication of public justice, and hence are named criminal contempts. As described in the statute, and element of willfulness or of evil intention enters into and characterizes them. They are a disturbance of the court which interferes with its performance of duty as a judicial tribunal; willful disobedience to its lawful mandate; resistance to such mandate willfully offered; contumacious and unlawful refusal to be sworn as witness, or to answer a proper question, and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of 'general powers of the courts and their attributes,' and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here again we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them, in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged." Referring to this decision, in *King v. Barnes*, 113 N. Y. 476, at p. 480, Judge Finch,

again speaking for the court, says: "It is true, as we have elsewhere said, that the main line of distinction between the criminal and civil contempts is that the one is an offense against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor. But we also pointed out this distinction, while marked and obvious, was not complete and perfect, since behind criminal contempts often stood some trace of private rights, and in civil contempts was occasionally to be found the element of punishment merely as distinguished from the bare enforcement of a remedy."

In civil contempts it is essential to sustain a conviction that there shall exist not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party, and this results from the fact that the civil contempt is not an offense against the dignity of the court, but against the party in whose behalf the mandate of the court has been issued, and a fine is imposed solely as indemnity to the injured party. It is otherwise in case of criminal contempt that is of a public character and indictable; it is directed against the dignity and authority of the court alone. So in proceedings to prosecute such an act the court will look only to the question of power, and if there were question of the power to grant the order, it will impose punishment upon those who willfully disobey it, for the purpose of vindicating its own power and maintaining its own dignity. Criminal contempts consist in a violation of the rights of the public as represented in their judicial tribunals. An element of willfulness exist in them, and they are punished in the interest of public justice, and not of individual litigants. Civil contempts need not be willful, and they are punished by a fine to the individual litigant as an indemnity for his loss. Conviction of a civil contempt involves a judicial determination that the party's rights or remedies have been defeated or impaired by the contempt. *People ex rel. Gaynor v. McKane*, 78 Hun, 154.

The civil contempt must be such as to defeat, impede, or impair a right or remedy to be punishable. (*Sandford v. Sandford*, 2 St. Rep. 133); but the rule is otherwise as to a criminal contempt, and a guilty party may be punished without proof that the adverse party has been injured. *Stubbs v. Ripley*, 39 Hun, 626; appeal dismissed, 102 N. Y. 734. The distinction between civil and criminal contempts is further given. *Matter of Watson*, 3 Lans. 408; *People v. Cowles*, 4 Keyes, 46; *Hawley v. Bennett*, 4 Paige, 163; *People ex rel v. Gilmore*, 88 N. Y. 626; *People v. Spaulding*, 10 Paige, 284; *People v. Hackley*, 24 N. Y. 74; *People v. Restell*, 3 Hill, 289; *People ex rel. Munsell v. Oyer and Terminer of N. Y.*, 101 N. Y. 245.

ARTICLE III.

CRIMINAL CONTEMPTS AND THEIR PUNISHMENT. Judiciary Law, §§ 750-752, 755; Penal Law, §§ 39, 600, 1939; Criminal Code, §§ 242, 243, 349, 350, 619, 635, 952.

Subd. 1. Code and statutory provisions, 683.

§ 750. *Power of courts of record to punish for criminal contempts, 683.*

§ 751. *Punishment for criminal contempts, 683.*

§ 752. *Requisites of commitment for criminal contempt, 684.*

39, *Penal Law. Military punishments preserved, 684.*

600, *Penal Law. Criminal contempt, 684.*

1939, *Penal Law. Mitigation of punishment in certain cases, 685.*

242, *Criminal Code. Effect of allowing a challenge to an individual grand juror, 685.*

243, *Criminal Code. Violation of last section, 685.*

349, *Criminal Code. If application for stay be denied, no other application can be made, 685.*

350, *Criminal Code. Violation of last section a misdemeanor and contempt, an order for removal to be vacated, 685.*

619, *Criminal Code. Disobedience to subpoena, or refusal to be sworn, or to testify, how punished, 685.*

635, *Criminal Code. Disobedience of witness, how punished, 685.*

952, *Criminal Code. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses, 685.*

Subd. 2. What constitutes criminal contempt, 685.

Subd. 3. Procedure for punishment, 692.

§ 755. *Judiciary Law. When punishment may be summary, 692.*

Subd. 1. Code and Statutory Provisions. Judiciary Law, §§ 750, 751, 752; Penal Law, §§ 39, 600, 1939; Criminal Code, §§ 242, 243, 349, 350, 619, 635, 952.

§ 750. **Power of courts of record to punish for criminal contempts.**

A court of record has power to punish for criminal contempt, a person guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings.

3. Willful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings.

But a court cannot punish as a contempt, the publication of a true, full and fair report of a trial, argument, decision, or other proceeding therein. (Code Civ. Pro., § 8.)

Consolidators' note to section 750.—The proceeding found in Code of Civil Procedure, chap. 17, tit. 3, "Proceedings to punish contempt of court other than criminal contempt," together with sections of the Code relating to punishment of criminal contempts, have been inserted in this chapter, since they relate entirely to a court and are not of such a nature to permit of being assimilated into an action.

§ 751. **Punishment for criminal contempts.**

Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is

also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense. (Code Civ Pro., §§ 9, 10.)

§ 752. Requisites of commitment for criminal contempt.

Where a person is committed for contempt, as prescribed in section seven hundred and fifty-one, the particular circumstance of his offense must be set forth in the mandate of commitment. (Code Civ. Pro., § 11.)

The provisions of sections 750, 751, 752 are identical with section 8, 9, 10 and 11 of the Code; hence the decisions in *People ex rel. Taylor v. Forbes*, 143 N. Y. 220 and *People ex rel. Barnes v. Court of Sessions*, 82 Hun, 242, 147 N. Y. 290, to the effect that the practice on punishment for criminal contempt is not regulated by statute, seems to be a correct statement of the law as it now exists under the Consolidated Statutes.

It is so stated in the report of the commissioners to revise the Code as to the chapters enacted to take effect in 1880, which includes "Civil Contempts," sections 2266 to 2292, now transferred to the Judiciary Law.

This is also clear from the fact that the Code provisions now transferred to the Judiciary Law were entitled, "Proceedings to punish a contempt of court *other than a criminal contempt*."

The codifiers say that they have "deemed it inexpedient to embody the practice relating to criminal contempts in this statute, not only because such a course would be inconsistent with the rules laid down by us for our guidance in this revision, but also because we deem it inexpedient to restrict the courts by statutory provisions to a prescribed mode of procedure, in a matter so important and admitting of such a variety of circumstances with respect to the nature of the offense and the most appropriate method of punishment, as the proceedings necessary for the preservation of their power and dignity."

PENAL LAW.

§ 39. Military punishments preserved.

This chapter does not affect any power conferred by law upon any court-martial or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officers, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this chapter. (Penal Code, § 724.)

§ 600. Criminal contempt.

A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of the court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority;
2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in

the presence of a jury, while actually sitting for the trial or a cause, or upon an inquest or other proceeding authorized by law.

3. Breach of the peace, noise, or other disturbance, directly tending to interrupt the proceedings of a court, jury or referee.

4. Willful disobedience to the lawful process or other mandates of the court.

5. Resistance willfully offered to its lawful process or other mandate.

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory;

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full and fair report of a trial, argument, decision, or other proceeding had in court. (Penal Code, § 143.)

Section 1939, provides that where it appears, at the time of passing sentence on a person convicted, that he has already paid a fine or suffered imprisonment for the act for which he stands convicted under an order adjudging it a contempt, the court passing sentence, may mitigate the punishment to be imposed, in its discretion. (Penal Code, § 681.)

CRIMINAL CODE.

§ 242. Effect of allowing a challenge to an individual grand juror.

If a challenge to an individual grand juror be allowed for any of the causes mentioned in subdivision one, two or three of section 239, he must be forthwith discharged from the grand jury. If such challenge be allowed for any of the causes mentioned in subdivisions four, five or six of section 239, the juror challenged cannot be present at or take part in the consideration of the charge against the defendant mentioned in or who interposes the challenge, or in the deliberations or vote of the grand jury thereon.

§ 243. Violation of last section.

The grand jury must inform the court of a violation of the last section, and the same is punishable by the court as a contempt.

§ 349. If application for stay be denied, no other application can be made.

If the application for an order to stay the trial has been made before one judge and denied, a similar application cannot be made to another judge.

§ 350. Violation of last section is a misdemeanor and contempt, an order for removal to be vacated.

A violation of the last section is punishable not only as a misdemeanor, but as contempt of the court in which the indictment is pending; and that court must vacate an order of removal made in violation thereof.

§ 619. Disobedience to subpoena or refusal to be sworn or to testify, how punished.

Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law.

§ 635. Disobedience of witness, not punished.

Disobedience of a subpoena, or a refusal to be sworn or to testify, may be punished by the court or officer, as prescribed in section 619.

§ 952. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.

All courts and magistrates having before them special proceedings of a criminal nature, may issue subpoenas for witnesses, and punish their disobedience in the same manner as in criminal actions.

Subd. 2. What Constitutes Criminal Contempt.

Any disorderly, contemptuous, or insolent behavior committed in the presence of any one of the constituent members of the court, while engaged in the business devolved upon it by law, is a contempt committed upon it in the immediate view of the court within the State. The act

of the newspaper reporter in secreting himself in a room, into which the jury of the Court of Oyer and Terminer were about to retire, remaining there, and, overhearing their deliberation, taking short notes thereof, and subsequently printing his recollection of the debate between the members of the jury, amounts to a criminal contempt committed in the immediate view and presence of the court, and the fact that the person committing the contempt was, when discovered, brought before the judge, who had no personal knowledge of the offense and consequently allowed him to depart, does not constitute a judicial determination upon the offense, and subsequent proceedings, by order to show cause, are not objectionable as placing the respondent twice in jeopardy. *Matter of Choate*, 24 Abb. N. C. 430, 18 Civ. Pro. 180, 8 N. Y. Crim. 1, 9 Supp. 321, 56 Hun, 351, 30 St. Rep. 728, 18 Civ. Pro. 230, 8 N. Y. Crim. 31; aff'd without opinion, under title *People ex rel. Choate v. Barrett*, 121 N. Y. 678.

An act which is not a civil or private contempt and which is not enumerated among the statutory contempts is not a contempt, although it may be punishable as a misdemeanor. It was adjudged that a juror who went to the scene of an affray for the purpose of acquainting himself with the locality was not guilty of contempt. The distinction between private or civil contempt and public or criminal contempt is pointed out in *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N. Y. 245.

The refusal of a witness to answer a proper question before a grand jury is punishable as a contempt. When the refusal was reiterated in the presence of the court and in the presence of the witness and he did not deny, but justified the same and reiterated his refusal, the contempt is one "in the immediate presence and view of the court," and no affidavit or evidence is requisite to the commitment. The appellate court before which the propriety of the commitment is brought either by certiorari or by habeas corpus is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right. The adjudication of the court in which the alleged contempt occurred, while conclusive upon the party committing the act of which he was convicted, and of its character, when that according to the circumstances may be meritorious or otherwise, cannot establish as a contempt that which the law entitled the party to do. An order made in a proceeding to punish for criminal contempt may be reviewed by certiorari. The provisions of the Code of Criminal Procedure to the effect that judgments and orders in criminal cases and in "special proceedings of a criminal nature" may be reviewed only by appeal, does not include proceedings to punish for criminal contempt. The provisions of the Constitution and statutes protect a person called as a witness in any judicial or other proceeding against himself or upon a

trial against others, from being compelled to disclose facts and circumstances that can be used against him as tending to connect him with any criminal evidence which may then or thereafter be used or charged against him, or the sources from which evidence of the commission or his connection with it may be obtained. The witness is always the judge in such a case of what the effect of the answer sought to be drawn from him might be, and if to his mind it might constitute a link in the chain of evidence sufficient to convict him, if other facts are shown, he may remain silent, unless it is perfectly clear that he is mistaken and that the answer cannot injure him or subject him to the penalty of a prosecution. So held in proceedings to punish for contempt for a refusal to answer questions. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, rev'g 77 Hun, 612.

A defendant in an action who, on the trial thereof, in the immediate view and presence of the court, abstracts and secretes a paper containing a contract which is the subject of investigation on the trial, which the plaintiff's attorney has laid down in front of such defendant, is guilty of criminal contempt within subdivision 1 of section 8 of the Code of Civil Procedure defining that offense. *Matter of Teitelbaum*, 84 App. Div. 351.

At common law it was a contempt of court for a witness or bystander to communicate with the grand jury touching a complaint under examination before them, without their request.

To constitute such communication a contempt under our statute relative to criminal contempts, the manner of making it must involve some contemptuous behavior committed during the sitting of the court, and at least tending to impair the respect due to it. *Henry Bergh's Case*, 16 Abb. Pr. 284.

It is contempt of court for a person who knows of the existence of an order in the hands of an officer intending to serve the same upon him, to prevent, willfully and by open force, either made or directed, the service of such process. *Conover v. Wood*, 5 Abb. Pr. 84.

The owner of premises and his contractor, restrained by injunction, obtained at the suit of a tenant, from tearing down the building "covered under plaintiff's leasehold," who, having dispossessed the tenant in summary proceedings, thereupon proceeded with the work, held guilty of a criminal contempt, it not being requisite to show on the proceeding for contempt a legal right in the tenant. *Matter of Ganz*, 38 Misc. 666, 78 Supp. 260.

The refusal of a witness to answer a proper question before a grand jury is punishable as for a contempt under the statute, as committed in a proceeding upon an indictment.

The adjudication of the court in which an alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do. *The People v. Hackley*, 24 N. Y. 74.

A subpœna issued by a district attorney is a mandate of the court within the provisions of section 8 of the Code of Civil Procedure, and disobedience thereof may be punished as for a criminal contempt under the provisions of section 619 of the Code of Criminal Procedure.

One who aids, procures, or advises the disobedience of a lawful mandate of the court is equally guilty with him who actually disobeys it. It is not necessary in order to constitute a contempt that resistance to such a mandate should be successful.

The relator, an under sheriff, received, for service, a subpœna requiring the person therein named to appear before the grand jury and also to produce certain books and papers. Relator served the subpœna on the person to whom it was directed but advised him at the time of service, and thereafter, not to produce such books and papers, and sought to induce him to destroy them. *Held*, that although the witness produced the books before the grand jury, relator was properly found guilty of, and punished as for, a criminal contempt. *People ex rel. Drake v. Andrews*, 197 N. Y. 53, rev'g 134 App. Div. 32, 118 Supp. 37.

Disobedience of an order, of the Court of General Sessions of the Peace in and for the city and county of New York, made under Code of Criminal Procedure, section 915, and directing a son to support his mother, is a civil and is not a criminal contempt; and, therefore, he may be punished for it by an imprisonment exceeding thirty days. *People ex rel. Kroncke v. O'Brien*, 39 Misc. 110, 78 Supp. 904.

If the proceedings in an order adjudging one guilty of a criminal contempt of court are regular, sustained by the evidence, and valid, the validity of the commitment can be tested only by a writ of habeas corpus. *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 Supp. 852.

Where the witness attends before the court in pursuance of a mandate, and is duly sworn, the court has power to require him to answer proper questions or be adjudged guilty of contempt, whether the examination is conducted by the judge personally, or by counsel in his presence. *Clark v. Brooks*, 26 How. Pr. 254.

The relator having been sworn as a witness in a proceeding pending in the Surrogate's Court of New York, and having refused to answer certain questions put to her was committed to the county jail for a criminal contempt. The commitment, after reciting that the relator had been convicted by the Surrogate's Court of contempt for a contumacious and un-

lawful refusal to answer certain legal and proper interrogatories propounded to her as a witness, directed that "she stand there committed, there to remain, charged with the said contempt as aforesaid, until she shall make answer to such legal and proper interrogatories as shall be propounded to her as a witness in this cause." *Held*, that the commitment was invalid; that the confinement should have been limited to the time when the witness was willing to answer the questions which had been actually propounded to her, and for a refusal to answer which she had been convicted of contempt.

Although it is not necessary that the questions which the witness has refused to answer should be set out *in hæc verba* in the commitment, yet it is the better practice to so set them out. *People ex rel. Jones v. Davidson*, 35 Hun, 471.

Where a witness duly summoned to testify before a grand jury refuses to answer proper questions, the court has power to commit him to the county jail for contempt until he shall have answered such questions, and such commitment is regular and lawful both under the common law and the statutes of the State. The justice and propriety of the commitment cannot be reviewed by habeas corpus. *People ex rel. Phelps v. Fancher*, 2 Hun, 226.

In *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, the power of the court to punish for contempt for disobedience of an injunction is discussed, and it is said upon the question as to whether a party is guilty of criminal contempt, that the question of jurisdiction does not involve an inquiry whether the case made by the complaint entitles the plaintiff to relief, but only whether the court had power to decide whether it entitled them to relief or not, and the rule is reiterated that an injunction granted in a case where the court has jurisdiction, though erroneously granted, is voidable only and not void, and until set aside must be obeyed. To warrant a punishment for contempt in violating a judgment or order of the court, the mandate alleged to have been violated should be clearly expressed, and not applied to the act complained of until a reasonable certainty is shown that it had been violated. *Ketchum v. Edwards*, 153 N. Y. 534. The rule is reiterated that an order of a court having jurisdiction must be implicitly obeyed, however erroneous it may be, and it is no defense when called upon to answer for disobedience that the order or judgment was erroneous or broader than the facts warranted, or has given relief beyond what was demanded and what the facts justified. The interest in maintaining respect for an order of the court forbids that litigants should be permitted, under a plea of hardship, real or imaginary, to set at naught the orders and decrees of the court, however improvidently granted, if it even seems certain that the court granted them under misapprehension or mistake. *People ex rel. Davis v. Sturtevant*, 9 N.

Y. 263, is cited, and also *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; *Koehler v. Farmers' Nat. Bk.*, 117 N. Y. 661; *People v. Pendleton*, 64 N. Y. 662; dist'd in 7 App. Div. 43.

Workmen who, after the granting of a preliminary injunction prohibiting the use of terror or violence, threaten another workman with death if he goes to work in a certain shop and who, to frighten still another workman away, incite and share in an assault upon him, are guilty of a criminal contempt and are punishable accordingly. *Stearns v. Marr*, 41 Misc. 252, 84 Supp. 36; aff'd, 88 App. Div. 422, 84 Supp. 965.

The power of a court of record to punish for contempt of its order is inherent and exists independent of statute. Such inherent power may be exercised by the court in addition to the power to punish for a contempt conferred upon it by statute.

A person, although not a party to an action in which an injunction has been granted and not served with such injunction, who, with knowledge of its provisions, willfully violates it, may be punished as for a contempt of court. The essence of the offense is the violation of the order with knowledge of its existence, and the manner in which knowledge of the injunction is obtained is not material. *People ex rel. Stearns v. Marr*, 88 App. Div. 422, 84 Supp. 965; modif'd, 181 N. Y. 463.

The willful disobedience of an injunction order by those having knowledge of its existence and terms and who clearly understand the nature of their acts, or by those chargeable with such knowledge and understanding, constitutes a criminal contempt and is properly punishable as such.

The fact that those disobeying an injunction were not parties *eo nomine* to the action in which it was granted and were not personally served with the order constitutes no defense to a proceeding to punish for a criminal contempt, where it expressly restrains not only the parties but those who act under or in connection with a party as attorneys, agents, or employees and they, with knowledge of the order and its terms, and acting as the employees of a party, willfully violate it; still less will such a plea be entertained in a case where the mandate was addressed to an unincorporated association and "its each and every member," as well as to all the defendants, their agents, etc., and the violators of the injunction were members of the association as well as employees. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, modif'g 88 App. Div. 422.

The city chamberlain of New York, *held*, not guilty of contempt for disobeying a writ of mandamus commanding him to turn over to the State Treasurer moneys which had remained unclaimed for twenty years or more when he has paid over all the money which he knew had been unclaimed for the period in question but retained other money which had been on deposit over twenty years which he was unable to say had re-

mained unclaimed for that time. It was proper therefore to deny the motion to punish him for contempt and on an application to appoint a referee to take and report proof as to whether claims to the money had been made. *People v. Keenan*, 132 App. Div. 331, 117 Supp. 42.

To warrant an indictment and punishment under the Revised Statutes as for a criminal contempt, for a willful disobedience of a "process or order lawfully issued or made" by a court of record, it must appear that the process or order disobeyed was lawfully issued by some court of record as such; it is not sufficient to show that it was issued by a public official without any direct action or determination by the court.

A subpoena issued by a district attorney in a criminal action is not such a process or order, and a willful disobedience thereof is not an indictable offense under said statutes. *Sherwin v. People*, 100 N. Y. 351.

Where a party has produced a book of account and proved the same, and has pointed out and explained the charges in it, called for in evidence, he may be compelled to go further, and required to read out of the book the specific items and charges to which he had referred and pointed, to the end that the same may be incorporated in his deposition and preserved as evidence. For his refusal to thus read from the book, he may be punished for contempt, as before stated. *People ex rel. Valiente v. Dyckman*, 24 How. 222.

In *People ex rel. Lewisohn v. O'Brien*, 81 App. Div. 51; aff'd, 176 N. Y. 253, and in *People ex rel. Lewisohn v. General Sessions*, 96 App. Div. 201; aff'd, 179 N. Y. 594, the question arose and was determined as to the constitutionality of statutes requiring a witness to answer questions in cases where he claimed his privilege under the Constitution upon the ground that the answer might incriminate him. In both cases proceedings were taken against Lewisohn for a criminal contempt. In both cases matters were sharply litigated as to the right to punish the relator as a matter of law, and incidentally with regard to the practice pursued in connection with the proceeding for contempt.

An attorney defending a prisoner on a criminal trial, who persists in attempting to induce the trial judge to reverse a ruling theretofore made by him, after the trial judge has positively declined to do so, and who, finding such persistent efforts ineffective, abruptly withdraws from the case in the midst of the trial, is guilty of a criminal contempt of court and may properly be fined, and, in default of the payment thereof, be committed to jail for a period of ten days. *People ex rel. Chanler v. Newburger*, 98 App. Div. 92, 90 Supp. 740.

In the *Klugman Case*, 49 How. 484, one Klugman, charged with attempting to bribe a juror in a trial at Circuit, was held guilty of criminal contempt and committed to the county jail for thirty days and fined the sum of \$250.

Subd. 3. Procedure for Punishment. Judiciary Law, § 755.**§ 755. When punishment may be summary.**

Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offense, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor. (Code Civ. Pro., § 2267.)

Proceedings for punishment for criminal contempt are not provided for in the Code of Criminal Procedure, nor is a criminal contempt there defined, or a punishment prescribed, except in section 619, which refers to cases of disobedience to process, and refusal to answer as witness, and in these cases the remedy is referred to the procedure prescribed in civil cases provided for in the Code of Civil Procedure. No provision is made in the latter Code for proceedings to punish for contempt, or to review any order made in such proceeding. *People ex rel. Taylor v. Forbes*, 143 N. Y. 220, rev'g 77 Hun, 612.

The practice of the courts for punishment of criminal contempt is not regulated by statute, except as prescribed by section 10 of the Code. The provisions of sections 2266 to 2292 refer to the practice in cases of civil contempt and not to those enumerated under section 8, except as to the acts enumerated in section 8, which are also enumerated under section 14 of the Code of Civil Procedure, and have resulted in the rights or remedies of a party to a civil action or special proceeding being defeated, impaired, impeded, or prejudiced thereby, where the offending party is sought to be punished, as for a civil or private contempt, upon the motion of the party injured. *People ex rel. Barnes v. Court of Sessions*, 82 Hun, 242; rev'd in 147 N. Y. 290, upon the ground that the final order entered in the proceeding failed to state the particular circumstances of the offense as required by section 11 of the Code of Civil Procedure so as to show whether or not the adjudication rested upon the only ground on which a criminal contempt can be based, viz.: Objection to a gross and inaccurate report of the proceedings of the court. Opinion by Haight, J., contains a discussion as to the nature of adjudication in contempt proceedings.

Criminal contempt may be divided into two classes: 1, That which is committed in the immediate view and presence of the court; and 2, That which is committed out of court. When the contempt is committed in the view and presence of the court, it may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense. (Code Civ. Pro., § 10). The publication of a false and grossly inaccurate report of a proceeding in court belongs to the latter class, and the party charged must be notified of the accusation. *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290 (295).

A plain line of distinction is drawn between proceedings for a contempt occurring in the presence of a judge, and the facts constituting which are certified by him, and cases of professional misconduct out of the presence of the court, where the actual truth is a matter of evidence. In the former class of cases it is held that the facts embodied in the order of the judge must be taken as true. In the latter the right of review is asserted, not only where had been want of jurisdiction, but where the court below had decided erroneously on the testimony. Its discretion is not unlimited, and while not to be overruled in cases of doubt, is yet subject to review. *Matter of Eldridge*, 82 N. Y. 161. An order made by the court is a sufficient commitment where the contempt has been committed in the presence of the court, and it appears it should direct the sheriff to take him into custody and confine him, and interrogatories do not seem to be necessary. *Matter of Percy*, 2 Daly, 530. Where a witness summoned before the grand jury declined to answer, and after the court had ruled the question proper he repeated his refusal, it was held to be a contempt in the immediate view and presence of the court, so that no affidavit or further evidence was needed for commitment. *Matter of Hackley*, 24 N. Y. 74. In the latter case no interrogatories were propounded.

An order punishing a person for contempt of court in failing to make a return as required by a writ of mandamus, not being for an act done in the presence of the court, cannot be granted on an *ex parte* application. *Matter of Reddish*, 47 App. Div. 187, 62 Supp. 261; *sub nom. Reddish v. Glavin*, 47 App. Div. 187, 62 Supp. 261.

A proceeding for criminal contempt is triable only before the justice in whose presence the contempt was committed, and cannot be transferred to another justice. *People ex rel. Deal v. Williams*, 51 App. Div. 102, 64 Supp. 457.

In criminal contempts committed in the immediate view of the court it may punish summarily. The only record preserved is in the final order or mandate of the court entered in the minutes of the clerk. If the particular circumstances of the offense were not required to be set forth, there would be nothing that the accused could have reviewed so that he could interpose as a defense to a subsequent conviction for the same act. If the court saw fit to call his act, no matter what it might be, a criminal contempt, that determination would of necessity be final, even though the act of the accused considered in the putting on of his hat as he was going out of the courtroom door, and failed to come within any of the provisions of the Code constituting a contempt of the court. The rule applies with equal force to contempts which are not committed in the presence of the court. *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290 (297).

A justice of the peace, holding a Court of Special Sessions, has jurisdiction and authority to punish a person as for a criminal contempt of such court, for willfully and contemptuously refusing to be sworn as a witness by or before such court, or by or before such justice, while holding such court as a justice of the peace, he having been duly subpoenaed as a witness. *Bowen v. Hunter*, 45 How. Pr. 193.

The power of the court to punish, as for a criminal contempt, "willful disobedience of any process or order lawfully made by it" should not be exercised unless the acts constituting the alleged contempt are clearly proved, and constitute a positive violation of the plain terms of the process or order.

If the order disobeyed be capable of a construction consistent with the innocence of the party, or of any intentional disrespect to the court, an attachment should not be granted. *Weeks v. Smith*, 3 Abb. Pr. 211.

An affidavit is not necessary as a foundation for contempt proceedings where the offense was committed in the immediate view and presence of the court or referee. *People ex rel. Baldwin v. Miller*, 9 Misc. 1.

In case of contempt in the immediate view of the court, the jurisdiction of the court to make the order to show cause does not depend upon the presentation of affidavits or other evidence to substantiate the charge. The court may act upon its own motion, and make the accusation, causing the party accused to be notified, and giving him a reasonable time to make his defense. The order contains the charge. And it seems that the party charged may appear by his counsel and make his defense. *People ex rel. Greeley v. Court of Oyer and Terminer*, 27 How. Pr. 14.

A mandate of commitment for a criminal contempt committed in the immediate view and presence of the court, which does not specify the particular circumstances of the offense, as required by section 11 of the Code of Civil Procedure, is defective, and such defect will be held fatal upon a review of the proceedings by certiorari, although the papers before the reviewing tribunal clearly establish the sufficiency of the proof to sustain the conviction.

A statement in the commitment to the effect that the offender, in the immediate view and presence of the court, behaved in an insolent and disorderly manner, which tended to interrupt the proceedings of the court and to impair the respect due to its authority, is not a sufficient statement of the particular circumstances of the offense. *People ex rel. Palmieri v. Marean*, 86 App. Div. 278.

Where proceedings are instituted under the statute in relation to criminal contempt, and the party charged has appeared in pursuance of an order to show cause, and filed an affidavit, denying the contempt, and setting forth facts tending to sustain such denial, the court may, if it desire further proof as to the alleged contempt, send the matter to a

referee to take testimony, and defer further action until the coming in of his report. *People ex rel. Alexander v. Alexander*, 3 Hun, 211.

A warrant issued by a district attorney as authorized by the statute for the arrest of a relator stated that he stood indicted "for contempt;" on habeas corpus, issued on the petition of the relator, *held*, that this was a sufficient specification of the offense; that as the statement was of a contempt which has already served as a basis of an indictment, it necessarily implied a willful contempt, of a character constituting a misdemeanor; also *held*, that it was not essential to the validity of the indictment that the accused should first have been adjudged guilty of contempt by the court whose process he disobeyed. *People ex rel. Sherwin v. Mead*, 92 N. Y. 415.

An order adjudging the defendants in an action guilty of a criminal contempt for disobeying an injunction *pendente lite*, which does not set forth the particular circumstances of the offense, as required by section 11 of the Code of Civil Procedure, is fatally defective; a general statement that the defendants disobeyed the injunction order is insufficient. *Roncoroni v. Gross*, 92 App. Div. 366.

The punitive authority of the courts in cases of criminal contempt is not for the purpose of vindicating the criminal law but to enable the court to enforce obedience to its commands; and the authority to punish for such a contempt resides exclusively with the court offended.

Where respondents, with others, as officers of a labor union, so acted as to further the commission of acts of violence and intimidation upon the part of members of the union during the course of a labor dispute, which acts it was the duty of such officers to endeavor to prevent according to the court's mandate, and, after successive appeals to the Appellate Division and the Court of Appeals resulting in affirmance in each instance of an order adjudging defendants guilty of criminal contempt, the court is asked to direct the execution of its sentence of fine and imprisonment, it may, upon the petition for clemency of the respondents directed to be imprisoned and upon payment of the fines imposed, stay the issuance of process for the imprisonment of the petitioners. *Typothetæ v. Typographical Union No. 6*, 66 Misc. 484, 123 Supp. 967; *aff'd*, 138 App. Div. 293.

After an adjudication one adjudged guilty of contempt will generally be allowed to purge the contempt by performing the act required, or undoing or reversing the acts constituting the contempt, or, where the act has caused injury to a party to the suit, by making reparation to the injured party. 9 Cyc. 59; *People ex rel. Baldwin v. Miller*, 9 Misc. Rep. 1; *People ex rel. Taylor v. Seaman*, 8 Misc. Rep. 152. Even where one is imprisoned for contempt, the court may at any time, in its discretion, either on its motion or upon proper application, inquire into the question

of the ability of the offender to obey the order, and if satisfied of the inability of the offender to comply he may be discharged. *Typotheta of New York v. Typographical Union No. 6*, 138 App. Div. 293, 295.

A commitment for criminal contempt can be attacked only by habeas corpus when the proceedings were regular, sustained by the evidence, and valid, and certiorari will not lie to review insufficiency of recitals in respect to the adjudication on which the commitment is based.

It seems that while the power to punish for a criminal contempt rests on the statutory warrant contained in the Code of Civil Procedure, section 8, resort may be had to common law to punish a private or civil contempt. *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 Supp. 852.

A judgment debtor cannot be punished for a criminal contempt for failing to appear for examination as to his property at the time stated in the order in proceedings supplementary to execution when he did appear two days later, and in the presence of the attorney for the plaintiff offered to submit to an examination, and it does not appear that his default was willful or intended. Nor can he be punished for a civil contempt in the absence of an adjudication that the rights of the judgment creditor were defeated, impaired, impeded, or prejudiced. *Matter of Jones*, 126 App. Div. 112, 110 Supp. 565.

In criminal contempt the punishment is imposed to vindicate the dignity of the court and in the interest of public justice, and not for the benefit of the party. The fine belongs to the public and not to the moving party, and costs are not allowed. *Boon v. McGucken*, 67 Hun, 251; *People ex rel. New York Soc. P. C. C. v. Gilmore*, 88 N. Y. 628; *People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245, 248; *Mutual Milk & Cream Co. v. Tietjen*, 73 App. Div. 532, 537, 77 Supp. 287.

Costs are not allowable in a proceeding to punish for a criminal contempt. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, modif'g 88 App. Div. 422, 84 Supp. 965.

ARTICLE IV.

SUMMARY PUNISHMENT AFTER DEMAND AND REFUSAL. § 756, Judiciary Law.

§ 756. Issue of warrant without notice.

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law. (Code Civ. Pro., § 2268.)

Section 2268 is not a definition of cases in which proceedings as for a contempt may be taken, but is simply the proceeding provided for en-

forcing, in appropriate cases, the contempts defined in section 14, as is apparent by reading section 2266. *Leslie v. Saratoga Brewing Co.*, 33 Misc. 118 (120), 67 Supp. 222; aff'd, 59 App. Div. 624.

A copy of the order or judgment must be served. *Park v. Park*, 80 N. Y. 156. And a demand must be made for payment of money to put a party in contempt. *Grey v. Cook*, 34 How. 432; *McComb v. Weaver*, 11 Hun, 271; *Fischer v. Raab*, 81 N. Y. 235. And by the person entitled to receive it. *Panton v. Zebley*, 19 How. 394; *People v. King*, 9 How. 97; *Tinkev v. Langdon*, 60 How. 180. Until service of a copy of the order is made a party cannot be brought in contempt for not complying with its direction. *Sandford v. Sandford*, 2 St. Rep. 133; *McCauley v. Palmer*, 40 Hun, 38.

In any case before a person can be punished for a contempt in disobeying an order, he must have had notice of it and an opportunity to become acquainted with its provisions, and a demand must have been made upon him to do the thing which the order required of him; therefore, an order appointing a receiver of the property of a judgment debtor which contains no requirement that the debtor deliver his property to the receiver, and no demand for its delivery has been made, the court has no power subsequently to grant an order, on the instance of the receiver, requiring the judgment debtor forthwith to turn over to the receiver certain property, or in the alternative that the debtor show cause why he should not be punished for a contempt; nor can the court, upon the return day of such order, adjudge the debtor to be in contempt. *Bradbury v. Bliss*, 23 App. Div. 607.

A defendant directed by a judgment to pay a sum of money is not in contempt until after the service upon him of a certified copy of the judgment; service upon his attorney is not sufficient to bring him into contempt, and the fact that he is aware of the judgment and has appealed from it and recognized its existence in other ways is entirely immaterial. While it seems a party may be punished for contempt in violating an order or judgment of which he has notice, he cannot be punished for failing to do something that he is commanded to do except in the manner specified in the statute. *Pittsfield National Bank v. Tailer*, 23 Civ. Pro. 48.

To bring a party into contempt, the order which he is charged with violating must be served personally upon him. *McCauley v. Palmer*, 40 Hun, 38; *Loop v. Gould*, 17 Hun, 585; *Gerard v. Gerard*, 2 Barb. Ch. 73; *People v. Murphy*, 1 Daly, 462.

Before defendant can be adjudged to be in contempt it must appear, not only that the order with which he was required to make compliance was served upon him, but that such service was accompanied with a demand that he make compliance therewith and pay the money directed to

be paid thereby; and a mere recital in the order adjudging him guilty, that it appears to the satisfaction of the court that a demand was made, without an affidavit or proof to that effect, does not make the order valid.

An order punishing a judgment debtor for contempt cannot be sustained upon an attorney's affidavit that he "refused to answer certain proper questions;" and did "make false answers to certain questions," no specific questions or answers being mentioned. *E. River Bk. v. De Lacey*, 37 Misc. 765, 76 Supp. 927.

To punish a person for contempt under section 2268 for non-payment of money ordered to be paid by the court, "the personal demand" required by the section, to be proved by affidavit, must be a demand by or on behalf of the party to whom the order requires payment to be made. *Matter of Gilman*, 15 St. Rep. 718.

Before an attachment can issue for non-compliance with a judgment or order, it must be distinctly settled by the court or referee what the party can properly be required to do. *Subton v. Davis*, 6 Hun, 237; appeal dism'd, 64 N. Y. 633; *People v. Alexander*, 3 Hun, 211.

To bring a party into contempt for disobedience of an order or judgment requiring the payment of money or the delivery of property, it is not sufficient that the order or judgment be served upon him, and he be made fully acquainted with its effect; but, in addition thereto, a compliance with the order or judgment must be strictly demanded by a party who has a right to make such demand; and when the order is to deliver property over to a receiver, the property must be demanded by the receiver personally. *McComb v. Weaver*, 11 Hun, 271; *First Nat'l Bank of Plattsburgh v. Fitzpatrick*, 80 Hun, 75.

Section 2268 of the Code of Civil Procedure, relating to contempt proceedings instituted because of the refusal to pay a sum of money required by an order, which provides that the court must be satisfied by proof by affidavit that a personal demand has been made for payment of the sum directed to be paid in the order, is not satisfied by a recital, in the order adjudging the offender guilty of contempt, that it appears to the satisfaction of the court that such a demand has been made, where there is no proof of that fact by affidavit or otherwise. *Flor v. Flor*, 73 App. Div. 262, 76 Supp. 813.

Section 2268 of the Code of Civil Procedure provides that when the court is satisfied that a personal demand for the payment of a sum of money required to be made by an order of the court has been made and that payment thereof has been refused, a warrant to commit may issue. Section 2269 provides that when the case is one mentioned in section 2268, the court may, in its discretion, make an order to show cause. The warrant or order to show cause must be based upon a personal demand. *General Electric Co. v. Sire*, 88 App. Div. 498 (500), 85 Supp. 141.

ARTICLE V.

WHAT CONSTITUTES CIVIL CONTEMPT. Judiciary Law, § 753; Code Civ. Pro., §§ 111, 157, 351, 433, 545, 681, 718, 776, 777, 778, 779, 802, 808, 853, 854-857, 874, 1018, 1241, 1443, 1444, 1618, 1675, 1681, 1716, 1773, 2007, 2073, 2096, 2135, 2136, 2451, 2481, 2555, 2579, 2602, 2709, 2870, 3001, 3002, 3003; Code. Crim. Pro., §§ 243, 350, 619, 729, 952; Debtor and Creditor Law, § 21, subd. 8; Civil Rights Law, §§ 20, 21, 25.

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§ 3247, *Code Civil Procedure. Costs in case of transfer of cause of action, 737.*

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Subd. 1. Statutory and Code Provisions Relating to Contempts. Judiciary Law, § 753; Code Civil Procedure, §§ 681, 718, 776, 777-779, 808, 1018, 1443, 1444, 111, 157, 351, 433, 545, 802, 2007, 1618, 1675, 1681, 1716, 2073, 2096, 2135, 2136; Code Criminal Procedure, §§ 243, 350; Debtor and Creditor Law, § 21, subd. 8; Civil Rights Law, §§ 20, 21, 25.

§ 753. Contempts punishable civilly.

A court of record has power to punish, by fine or imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpœnaed as a witness, for refusing or neglecting to obey the subpœna, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party. (Code Civ. Pro., § 14.)

The Code and statutes provide that certain acts or omissions shall be deemed a contempt of court. These provisions are numerous and varied in their character. An attempt is made to enumerate the more important.

§ 681. Return of inventory; how enforced.

The disobedience of an order made by the court requiring the sheriff to return the inventory in attachment proceedings is a contempt.

§ 718. When sheriff may take and convey, etc., property.

It is provided that where the direction by the court made as prescribed in the section with reference to a deposit or delivery of property,

or conveyance of real property, is disobeyed, such disobedience may be punished as for a contempt.

§§ 776, 777, 778. **Application for order after denial of prior application.**

When an application for an order made to a judge of the court, or a county judge, is refused, and an application is made to another judge, in reference to the same matter, for the same order or where an application is made to the court for judgment and a subsequent application made before another judge for the same judgment, such application shall be punished by the court as for a contempt.

Section 779 provides that nothing in that section which relates to the manner of collecting costs of a motion shall be construed so as to relieve a party from imprisonment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings now exists.

§ 808. **Penalty for disobedience of order for discovery.**

Where an order has been made under the provisions of section 803 *et seq.* of the Code, requiring a discovery or inspection of papers, the court may punish a refusal to comply with the order as for a contempt.

§ 1018. **General powers of a referee upon a trial.**

Under this section a referee has power to punish a witness for contempt of court for non-attendance, or for refusal to be sworn, or to testify.

§ 1443. **Proceedings to punish violation of the order.**

If the judgment debtor or other person in possession of property which has been sold commits waste in violation of an order granted by the court under section 1443, he may be punished for a contempt. Section 1444 prescribes the mode and extent of the punishment.

The following Code provisions also relate to contempts:

Section 111 relates to imprisonment on execution, and provides that no person shall be imprisoned within the prison walls for a longer period than three months under an execution or other mandate against the person to enforce the recovery of a sum of money less than \$500 in amount or under a commitment upon a fine for contempt of court in the non-payment of alimony or counsel fees in a divorce case; where, in such cases the amount is \$500 or over such imprisonment shall not continue for a longer period than six months.

Section 157 provides that the prisoner committed to jail upon process for contempt, or for misconduct in a case prescribed by law, must be actually confined and detained within the jail until he is discharged by due course of law and he is removed to another jail or place of confinement in a case prescribed by law.

Section 351 places restrictions upon the power of the County Court to remit a fine where it has been imposed by a court upon an officer or other

person, for an actual contempt of court, or for disobedience to its process or other mandate.

Section 433 excepts a proceeding to punish for contempt from the provisions for method of service prescribed by article 1, title 1, chapter 5.

Section 545. Failure on the part of an attorney, whose name is subscribed to a pleading from which scandalous matter has been stricken out, to pay costs of motion may be punished for contempt.

Section 802 excepts from the provisions of article 3, title 6, chapter 8, service of a paper to bring a party into contempt.

Section 2007, certain costs awarded by a final order in special proceedings may be enforced by contempt.

Section 1618, proceedings where a defendant consents to receive a fixed sum in lieu of dower and refuses a release. Disobedience of the order may be punished by proceedings for contempt.

§ 1675. When and how court may compel delivery of possession of real property to purchaser.

Where a party, or the representative or successor of the party who is bound by the judgment withholds possession of the property from the person declared to be entitled thereto, the court may punish him for contempt.

§ 1681. Defendant, how prevented from committing waste.

This section provides that if, during the pendency of the action, defendant commits waste upon the property, the court may grant an order restraining the commission of waste and the disobedience of the order may be punished as for a contempt.

§ 1716. Return, etc.; how compelled.

If a sheriff fails to comply with section 1715, with regard to the return, as to the manner in which he has executed process in replevin; he may be punished for contempt.

§ 2073. Return of demurrer to first writ.

In default of a return to a writ of mandamus the person on whom the writ was served may be punished on the application of the people, or of the relator for a contempt of court.

§ 2096. Absolute writ issues, unless return made.

On default of return to a writ of prohibition the judge or members of the court failing to make the return may be punished for contempt of the court issuing the writ.

§§ 2135-2136. Return to writ of certiorari; how compelled.

Omission to make return, as required by writ of certiorari or by an order for a further return, may be punished as a contempt.

Section 243 of the Code of Criminal Procedure, where a challenge to a grand juror has been allowed, such juror cannot be present to take part in consideration of the charge against the defendant who interposed the

challenge, or in the deliberations, or vote of the grand jury thereon, and a violation of the provision is punishable as a contempt.

Section 350, Code Criminal Procedure, provides when an application for an order to stay a trial has been made before one judge and denied before another, a similar application is punishable as a contempt of the court in which the indictment is pending.

The Debtor and Creditor Law, section 21, subdivision 8, provides for punishment as for a contempt of any disobedience or violation of any order made or process issued in proceedings for general assignment for the benefit of creditors.

The Civil Rights Law contains the following provisions:

§ 20 (Formerly Code, § 15). No imprisonment for non-payment of costs in certain cases.

A person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by a state writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.

§ 21 (Formerly Code, § 16). No imprisonment for non-payment of money pursuant to judgment or order requiring payment of money due upon contract.

Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.

§ 25 (Formerly Code, §§ 860, 863). Witness exempt from arrest.

A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding, while to, remaining at, and returning from, the place where he is required to attend. An arrest, made contrary to the provisions of this section, is absolutely void.

Subd. 2. How and when Judgment Enforced by Contempt Proceedings. § 1241.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court:

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except in a case specified in the next subdivision.

4. Where the judgment requires the payment of money into court, or to an officer of the court; except where the money is due upon a contract, express or implied, or as damages for non-performance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced, as prescribed in this section, either simultaneously with, or before or after the issuing of an execution thereupon, as the court directs.

The provisions of section 1241 are not imperative; the judgment creditor has no claim *de jure* that the power should be exercised; its exercise is discretionary with the court below. *Cochrane's Executor v. Ingersoll*, 73 N. Y. 613; *Nolan v. Nolan*, 29 Hun, 630. The cases where disobedience to a judgment may be punished as a contempt are, where it cannot be enforced by execution, or where it directs the payment of money into court, or to an officer of the court. *O'Gara v. Kearney*, 77 N. Y. 423. A surety on an administrator's bond, who, after an unsatisfied decree against him, and a judgment on the bond, has paid the amount, has a right to an attachment against the administrators; the judgment on the bond did not take away any remedy on the principal debt, and attachment and execution may be used concurrently. This decision under the Revised Statutes. *Townsend v. Whitney*, 75 N. Y. 425. Where a judgment adjudges the payment of a sum to a creditor from the surplus income of a trust estate, the trustee is, after demand, personally liable, and precept may be issued to collect the amount on motion, on its being shown that he has paid the amount over on another judgment. *Williams v. Thorn*, 81 N. Y. 381. When a judgment requires a party to execute a conveyance, and an instrument in proper form is tendered him, he is bound to execute it, though it has not been submitted to the court for approval, and it need not be tendered simultaneously with service of a copy of the judgment. *Hilliker v. Hathorne*, 5 Bosw. 710; *Morris v. Walsh*, 9 Bosw. 636.

The method of proceeding to punish for contempt on refusal by a party to carry out the requirements of a judgment was considered in *Pitt v. Davidson*, 37 N. Y. 235, 3 Abb. N. C. 398, 34 How. 455. A judgment directing defendant to pay plaintiff money received by defendant for property sold in violation of an injunction cannot be enforced by contempt proceedings under section 1241, such judgment being enforceable by execution. *Tabor v. Jaecke*, 12 Supp. 645, 45 St. Rep. 832. A judgment rendered in an action compelling a trustee of a corporation to account for property of the corporation wrongfully appropriated by him, and directing him to pay over the value thereof in money to the receiver, may be enforced by contempt proceedings even though execution could have been issued thereon. *Gildersleeve v. Lester*, 68 Hun, 535; *aff'd*, 139 N. Y. 608, 52 St. Rep. 559, 22 Supp. 1028. When the sole liability which is sought to be enforced by judgment is that of a partner to his copartners, and such liability arises out of a contractual relation existing between them, a fiduciary relation is not established such as will authorize the punishment of defendant for contempt under section 1241. *Walford v. Harris*, 78 Hun, 348, *dist'g Gildersleeve v. Lester*, 68 Hun, 535. In order to enforce a judgment under section 1241 the defendant should be served personally with a copy of the judgment. Service of

defendant's attorney with personal demand upon defendant is insufficient. *Fero v. Van Evra*, 9 How. 148.

Subdivision 4 of section 1241 provides that a person disobeying a judgment of the court which required the payment of money into court, or to an officer of the court, except where it is due upon a contract express or implied, or for damages for non-performance of the contract, may be punished for contempt, and where an order was made by which the relator was directed to pay over a sum of money to a receiver, a demand having been made, and the relator having failed to make the payment, a warrant of attachment was properly issued. *People ex rel. Pond v. Hampton*, 15 Misc. 364.

A final judgment in an action for specific performance which directs the defendant to accept the deed tendered and make the payments called for by the contract up to the date of decree, execute and deliver a bond and mortgage for the balance of the purchase price, and pay all taxes and assessments which had become liens since the date that title should have passed, with costs and disbursements, is enforceable by execution to the extent of the payments required to be made, and cannot be enforced by proceedings for contempt unless defendant is shown to have refused to comply with the remainder of the judgment, viz.: acceptance of the deed and execution of the bond and mortgage. *Kittel v. Stueve*, 11 Misc. 279, 32 Supp. 272.

The writ of nuisance as it existed at common-law has been abolished, and a judgment requiring the removal of a nuisance must be served upon the defendant and enforced by contempt proceedings under section 1241 of the Code of Civil Procedure. *Heughes v. Galusha Stove Co.*, 122 App. Div. 118, 106 Supp. 606.

A judgment for costs having been rendered against a guardian *ad litem* for plaintiff, on the dismissal of the complaint, held that an order punishing him as for a contempt should be reversed, and supplementary proceedings be resorted to, the remedy by attachment afforded by section 316 of the former Code being modified in effect by the Code of Civil Procedure, section 3249. *Pierce v. Lee*, 36 Misc. 865, 74 Supp. 927.

A judgment, rendered in an action wherein the assignee in trust of a mortgage seeks the direction of the court as to the disposition of the proceeds, adjudging, among other things, that within five days from the service of a copy of the judgment and notice of entry thereof, the assignee shall pay a certain sum to the estate of a creditor, is a judgment directing the payment of a sum of money within the meaning of section 1240 of the Code of Civil Procedure, is entitled to be docketed by the proper clerk, is enforceable only by execution, and cannot, where the clerk has refused to docket it upon the ground that it was not by its terms immediately payable, and the assignee has refused to pay it upon service of a certified copy

thereof, be enforced by proceedings for a civil contempt under either subdivision 1 or 3 of section 14 of said Code. *Harris v. Elliott*, 163 N. Y. 269, rev'g 48 App. Div. 98, 62 Supp. 632.

The right to proceed by contempt for the enforcement of a judgment is very fully considered in *People ex rel. Borst v. Grant*, 41 Hun, 351, citing and considering *People ex rel. Fries v. Riley*, 25 Hun, 587, and *Myers v. Becker*, 95 N. Y. 486, and the distinction drawn between classes of actions where judgment must be enforced by execution and those in which it may be enforced by proceedings for contempt.

In order that a commitment for a contempt may issue for the disobedience of a judgment or order, the precise thing to be done by the party proceeded against must be stated in the judgment or order; there should be no opportunity for ambiguity. Party should be adjudged to do a specific act. *Ross v. Butler*, 19 Civ. Pro. 152.

A motion to punish defendants for contempt was granted, where they, being required by judgment to deliver a check to plaintiff, disobeyed the judgment. *Hatton v. McFaddin*, 15 Civ. Pro. 42, 16 St. Rep. 944.

An order directing an assignee for creditors to pay over to the receiver all the assigned estate, the amount found due upon his accounting, is enforceable by execution under section 1240, and the failure to pay over cannot be punished as a contempt. *Matter of Hess*, 48 Hun, 586.

An interlocutory judgment which, among other things, directs the recovery of money, is not like one directing money to be paid into court or ordering restitution of money paid out of court, and it cannot be enforced by contempt proceedings. *Potter v. Rossiter*, 109 App. Div. 35, 95 Supp. 1036.

Subd. 3. Violation of Injunction.

See also authorities holding "Violation of an injunction to be a criminal contempt." Art. 3, subd. 2.

A defendant against whom an injunction has been granted, of which he has been fully advised, and who acts in violation thereof, is liable to punishment for contempt. The rule in proceedings for contempt is analogous to that in prosecutions for crime, and the intent required to be proved is not the intent to violate the order of the court, but of the act which the law or the order of the court forbids. *Gage v. Denbow*, 49 Hun, 42.

Where a court having jurisdiction grants an injunction order it is the duty of the person enjoined to obey the injunction until it is vacated; for disobedience thereto he is guilty of contempt, and it is no answer to allege that the plaintiff had no cause of action and was not entitled to recover. A fine of an amount of money equal to that collected and used by the defendant in violation of the injunction order was held to be properly imposed. *Sheffield v. Cooper*, 21 App. Div. 518.

A party is properly adjudged guilty of contempt in not obeying an injunction order, unless it is void for lack of jurisdiction on the part of the judge granting it, and may properly be punished for disobedience thereto. *People v. Van Buren*, 136 N. Y. 252.

The committing or continuance of forbidden acts by the servants of a corporation after its general officers were advised of the issue of an injunction and order forbidding such acts was held to be a contempt of court on the part of the corporation, equally as if there had been strict service of the injunction. *Rochester, etc., R. R. Co. v. L. E. & W. R. R. Co.*, 48 Hun, 190.

Where the court had no authority to grant an injunction order which the defendant is charged with violating, he cannot be punished as for a civil contempt. *Bachman v. Harrington*, 184 N. Y. 458, rev'g 108 App. Div. 357, 95 Supp. 1113.

Where a court has jurisdiction of the subject-matter and to grant a preliminary injunction, an order made must be treated as a valid and binding order of the court, and as such obeyed until revoked by subsequent order made in the same action. This applies to criminal contempts. *People ex rel. Gaynor v. McKane*, 78 Hun, 154. Under subdivision 4, section 14, any person who interferes with the process, control, or action of the court in a pending litigation unlawfully and without authority is guilty of a civil contempt if his act defeats, impairs, impedes, or prejudices the rights or remedy of a party to such action or proceeding. The advising and procuring the disobedience of a judgment is a contempt, and where the offense was an affirmative act of resistance to the process of the court, and an active effort to defeat its orders and make its judgment nugatory, it was properly punished even though the act required had been performed. *King v. Barnes*, 113 N. Y. 476, 23 St. Rep. 263, aff'g 51 Hun, 551, 4 Sup. 247.

In *People ex rel. Cauffman v. Van Buren*, 136 N. Y. 252, the violation of an injunction order is considered in connection with the question of contempt. It is held that unless such an order is void upon its face for lack of jurisdiction on the part of the judge granting it, the party disobeying it may properly be adjudged guilty of contempt, however erroneous the granting of the order may have been; unless there was an entire absence of judicial authority to act it is the duty of the party to obey it until it is revoked. A person who, after the court has decided to restrain the doing of an act, with knowledge of the decision does the act, may be punished for contempt, although the decision of the court has not been formulated by the order or writ. *People ex rel. Platt v. Rice*, 144 N. Y. 249.

One charged with contempt for disobeying an injunction cannot defend on the ground that the court erred in granting it.

That the original order was modified on appeal is no excuse for failure to obey it, if it was affirmed in its essential parts. *Hathorn v. Natural Carbonic Gas Co.*, 137 App. Div. 557, 121 Supp. 683.

It was held that it did not excuse disobedience of the order made within the jurisdiction of the court if the party was advised and believed that it was invalid. *Fischer v. Langbein*, 103 N. Y. 84; *Day v. Bach*, 87 N. Y. 56. The rule that it is no answer to proceedings for contempt in violation of an injunction that the injunction was improvidently granted was reiterated. *Koehler v. Farmers & Drovers' National Bank*, 6 Supp. 470; cited, *People v. Bergen*, 53 N. Y. 404; *Clark v. Bininger*, 75 N. Y. 344; *People v. Dwyer*, 90 N. Y. 402. See, however, *Krone v. Kings Co. El. R. R. Co.*, 50 Hun, 441, 3 Supp. 149. The rule in *Hull v. Thomas*, 3 Edw. Ch. 236; *Livingston v. Swift*, 23 How. Pr. 1, that persons having knowledge of the injunction are punishable for its disobedience so far as it is necessary to indemnify the party injured by their disobedience, although never served upon them, has been uniformly followed.

Acting under the advice of counsel is no justification, and goes in mitigation only to the extent that the court is satisfied that the advice was sought, obtained, and acted on in good faith.

Servants and agents who, with a knowledge of an injunction, aid in its violation, and attorneys who advise its violation are liable for contempt, even though the order had not been served upon them. *Stolts v. Tuska*, 82 App. Div. 81, 81 Supp. 638.

It is only when there is a question as to whether the act complained of is actually a violation of the injunction that advice of counsel can be accepted as an excuse. *Matter of Grantz*, 78 App. Div. 399, 79 Supp. 899.

It is sufficient excuse when an act has been directed by mandamus to show that an injunction has been granted restraining the same act. *People v. Village of West Troy*, 25 Hun, 179.

An injunction obtained by a partner, preventing other partners from meddling with the partnership property, will not prevent the creditors of the firm from proceeding at law to recover their debts, or an injunction of the firm from confessing a judgment, so as to give a creditor a preference. *McCredie v. Senior*, 4 Paige, 378. An attorney having two clients, if one is enjoined, it does not limit his professional action as to the other claiming different rights and interests. *Slater v. Merritt*, 75 N. Y. 268.

Proceedings to punish members of a union for contempt in disobedience of an injunction against the use of intimidation, threats, force, or fraud, etc., sustained. *In re McCormick*, 117 Supp. 70.

Although an injunction has issued restraining a certain person, his representatives, assigns, and agents, from imitating a certain trade label, other persons not served with a certified copy of the decree and not

shown to be acting for or with the defendant cannot be punished for contempt for using a similar label. *Matter of Zimmerman*, 134 App. Div. 591, 119 Supp. 275.

Disobedience to an injunction order will be punished as a contempt, and it is not necessary that service of the order should have been made if the person violating it has knowledge it has been granted. *Mayor v. N. Y. & S. I. Co.*, 40 Super. Ct. 300; *aff'd*, 64 N. Y. 623; *People v. Brower*, 4 Paige, 405; *Neale v. Osborne*, 15 How. 81; *Wheeler v. Gilsey*, 35 How. 139; *Atlantic Tel. Co. v. Baltimore, etc., R. R. Co.*, 46 Super. Ct. 377; *Ewing v. Johnson*, 34 How. 202; *Waffle v. Vanderheyden*, 8 Paige, 45. But damages may be recovered in an action for such violation, or proceedings taken for contempt, at the election of the injured party. *Porous Plaster Co. v. Seabury*, 43 Hun, 611. The court will not countenance any evasion of the injunction order, and will punish an intentional violation of its fair intent. *Mayor v. N. Y. & S. I. R. R. Co.*, 64 N. Y. 622; *Ogden v. Gibbons*, 4 Johns. Ch. 174; *Devlin v. Devlin*, 69 N. Y. 212. Service on the mayor of a city or president of a corporation binds the officers of each. *People v. Sturtevant*, 9 N. Y. 263; *Rorke v. Russell*, 2 Lans. 242. Officers of a corporation who have personal knowledge that a corporation is enjoined, and nevertheless violate the injunction, are punishable. *Abell v. N. Y., etc., R. R. Co.*, 18 Wkly. Dig. 554; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171. But the order must clearly embrace the act complained of to entitle the person injured to process for contempt. *German Sav. Bk. v. Habel*, 58 How. 336; *Kennedy v. Weed*, 10 Abb. 62.

An injunction order in a suit against city officials to enjoin them from the removal of a sidewalk fruit stand, granted under subdivision 1 of section 604 of the Code of Civil Procedure, restraining the defendants and "all other persons having knowledge of this injunction order," restrains the defendants and those only who act either as their servants or agents or in combination or collusion with them, or in assertion of their rights or claims. Parties in no way connected with the defendants, who removed the stand, but neither acted nor assumed to act under their authority, and who removed it in the execution of the process of another court issued on a judgment not based on any claim of the city that the stand was a nuisance, but on a right asserted by a landlord to dispossess a defaulting tenant, are not guilty of a contempt of court as for a violation of the order, although they had knowledge of its provisions. *Rigas v. Livingston*, 178 N. Y. 20, *rev'g* 86 App. Div. 626.

An order restraining creditors from bringing actions against a corporation for the recovery of a sum of money does not prohibit a creditor from filing a mechanic's lien against the property of a third person in the construction of which the corporation had used the materials furnished by the creditor; and, therefore, the filing of such lien does not constitute a contempt. *Matter of Simonds Furnace Co.*, 30 Misc. 209, 61 Supp. 974.

When an injunction restraining the working of an ash-receiving plant "in such manner as to cause a nuisance to plaintiff's said real property" does not prohibit the operation absolutely, nor prohibit any express acts, a defendant who has made improvements in the plant so as to obviate most of the defects complained of should not be adjudged guilty of contempt in continuing to operate the plant, although the improvements are not beyond criticism. Under such circumstances continuing the business under the improved conditions is not a wilful disobedience of the court's command. *Saal v. S. Brooklyn R. Co.*, 122 App. Div. 364.

Violation of an injunction against instituting a second summary proceeding, the first having been denied adversely to the petitioner, excused where the second proceeding was discontinued before service of the order in the contempt proceedings and had been begun under a mistaken theory that the injunction had lapsed for failure to file a bond. *Jones v. Burgess*, 109 App. Div. 888, 96 Supp. 873.

Where the proprietor of a bathing establishment was enjoined from permitting his customers to use a private lane, the fact that he removed a fence on his premises so as to make the lane conveniently accessible therefrom held sufficient basis for an adjudication of contempt. *Douglas v. Bush*, 34 App. Div. 226, 54 Supp. 428.

Continued trespass upon real estate in defiance of an injunction and occupation for more than a year after it was issued, of boathouses which defendant had moved upon the property, and until contempt proceedings were instituted, held to justify a fine for the amount the owner incurred for costs and expenses, and for \$250 additional, under Code of Civil Procedure, section 2284. *Country Club Land Ass'n v. Lohbauer*, 43 App. Div. 169, 59 Supp. 389.

A municipal corporation violating an injunction may be punished by a proper fine under section 2284 of the Code of Civil Procedure.

The municipality itself and not merely its agents and officers are liable for contempt on the violation of such injunction.

Hence, when such municipality, by its agents and officers, has violated an injunction restraining the cutting of shade trees in front of the premises of a private person, an order appointing a referee to take testimony and report to the court respecting the alleged violation of the injunction will be confirmed. *Marson v. City of Rochester*, 112 App. Div. 51, 97 Supp. 881.

Plaintiff, having obtained an injunction against defendant using a name similar to its own, and its patterns and designs, as well as "from using the numbers devised by the plaintiffs to facilitate their business with customers set forth in the complaint, or any similar numbers based on such numbers, or upon the system devised by" plaintiff, held that the use of the numbers to designate the classes of goods, with the simple

prefix of the figure "1" to each number, was a contempt. *Brown v. Braunstein*, 86 App. Div. 499, 83 Supp. 798.

Where the final decree in an action to set aside the probate of a will enjoins all parties from "maintaining any action . . . based upon a claim" that the paper was not the will of the decedent, a party so enjoined who begins a new action which is in effect based upon a claim that the instrument is not the decedent's will is guilty of contempt. *Anderson v. Smithley*, No. 2, 141 App. Div. 429.

Subd. 4. Punishment of Witnesses for Contempt. Code Civil Procedure, §§ 853, 854-857, 808, 874, 1018; Code Criminal Procedure, §§ 619, 729, 952.

CODE PROVISIONS RELATIVE TO PUNISHMENT OF WITNESSES.

§ 853. Penalty for disobedience.

A person so subpoenaed, who fails, without reasonable excuse, to obey the subpoena, or a person who fails, without reasonable excuse to obey an order, duly served upon him, made by the court, or a judge, in an action, before or after final judgment therein, requiring him to attend, and be examined, or so to attend, and bring with him a book or paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action, or in separate actions. If he is a party to the action in which he was subpoenaed, the court may, as an additional punishment, strike out his pleading.

§ 874. Punishment for disobeying order.

Witness fees at the rate prescribed by law in an action in the supreme court, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order, his attendance may be compelled, and he may be punished in like manner, and the proceedings thereon are the same, as if he failed to obey a subpoena, issued from the court, in which the action is pending; or, if no action is pending, from the court of which the judge is a member.

Sections 854 to 857, inclusive, provide for subpoena to be issued by a judge, arbitrator, referee, or other person, or a board or committee, or a committee of either house of the Legislature, or a joint committee thereof, and for the method of punishment of the witnesses who disobey such a subpoena.

§ 808. Penalty for disobedience of order for discovery.

Where an order has been made under the provisions of section 803 *et seq.* of the Code, requiring a discovery and inspection of papers, the court may punish a refusal to comply with the order as for a contempt.

§ 1018. General powers of a referee upon a trial.

Under this section a referee has power to punish a witness for contempt of court for non-attendance, or for refusal to be sworn or to testify.

§ 619. Code criminal procedure. Disobedience to subpoena, or refusal to be sworn or to testify, how punished.

Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the Judiciary Law.

Section 729, Code Criminal Procedure, provides that the court of special sessions may issue subpœna for witnesses and punish disobedience thereof.

Section 952, Code Criminal Procedure, provides that all courts and magistrates having before them special proceedings of a criminal nature, may issue subpœna for witnesses and punish their disobedience in the same manner as in criminal actions.

The contumacious and unlawful refusal of a person who has been sworn as a witness to answer any legal and proper interrogatory may be punished criminally as a violation of subdivision 5 of section 8 of the Code of Civil Procedure, or civilly as a violation of subdivision 5 of section 14 thereof. *Jones v. Davidson*, 35 Hun, 471.

Refusal to answer by a witness is not less punishable civilly because it might be punished criminally. *Matter of Jones*, 6 Civ. Pro. 250. But although a witness will be compelled to answer, he will not be obliged to sign a deposition when it might subject him to legal liability. *Marx v. Spaulding*, 6 St. Rep. 530.

The refusal of a witness to obey the order of a referee to produce certain books upon an examination before him is not punishable by the imposition of a fine, but the action of the court in such case is governed by section 856 of the Code. *Press Pub. Co. v. Associated Press*, 41 App. Div. 493, 58 Supp. 708, modif'g 27 Misc. 90, 58 Supp. 186, 29 Civ. Pro. 203.

Where failure to produce books and papers is sought to be excused by a plea that the witness did not have the possession or control of them, that fact, and the witness' good faith, must be shown by affirmative proof. *Press Pub. Co. v. Associated Press*, 27 Misc. 90, 58 Supp. 186, 29 Civ. Pro. 203; modified, 41 App. Div. 493, 58 Supp. 708.

Contempt of court on the part of a witness in refusing to answer questions may be summarily punished.

Where the witness refuses to answer questions before the grand jury at a time when the Oyer and Terminer is in session, the offense is one committed in the presence of the court.

During the session of the court at which the witness was committed no other court has power to interfere by habeas corpus or certiorari to inquire into the cause of detention. *Matter of Taylor*, 8 Misc. 159, 28 Supp. 500.

A witness is not guilty of a contempt in refusing to testify to a fact which would subject him to a penalty or forfeiture. *Henry v. Salina Bank*, 1 N. Y. 83. Nor is a county treasurer bound to answer an interrogatory put to him by a committee appointed by a board of supervisors concerning moneys in his hands as such treasurer. *In re Dickinson*, 56 How. 260. A witness is not bound to answer a question tending to dis-

grace or criminate himself. *In re Lewis*, 39 How. 155; *Lohman v. People*, 1 N. Y. 379; *People v. Rector*, 19 Wend. 569; *People v. Herrick*, 13 Johns. 82. The privilege is, however, personal to the witness. *Brandon v. People*, 42 N. Y. 265; *Southlard v. Rexford*, 6 Cow. 254; *Ward v. People*, 6 Hill, 144.

By statute, communications between attorney and client, between physician and patient, and between clergyman and layman, are confidential; also between husband and wife.

It is not a contempt for a witness to refuse to make a promise as to what he will do in the future and in case of the happening of some contingency. *Matter of Freligh*, 42 Misc. 11, 85 Supp. 830.

A witness cannot be punished for contempt for refusing to answer a question immaterial and irrelevant to the issue. *Matter of Odell*, 6 Denio, 344.

A witness is liable for contempt for refusing to attend court, and it need not appear that such conduct was calculated to, or did, impair the rights or remedies of the parties complaining thereof. *Bleecker v. Carroll*, 2 Abb. 82; *Woods v. DeFiganiere*, 1 Rob. 607. In proceedings to examine a witness before trial, it must appear, to put him in contempt, that the order prescribed by section 873 has been served on him. *Loop v. Gould*, 17 Hun, 585; *Tebo v. Baker*, 16 Hun, 182. The court is to decide as to whether a question put to a witness is proper, and that question cannot be inquired into, to impeach a commitment for contempt. *People v. Cassells*, 5 Hill, 164; *People v. Sheriff*, 7 Abb. 96; *Forbes v. Meeker*, 3 Edw. 452.

Code of Civil Procedure, section 14, subdivision 5, authorizing a court of record to punish a witness for contempt in refusing or neglecting to answer as a witness, emphasized by section 2281, providing for a final order directing the punishment of the delinquent, does not authorize the committal of witness for contempt for evasive and contumacious conduct, when there is no adjudication of injury to the right or remedy of any party. *Manzella v. Ryan*, 73 App. Div. 137, 77 Supp. 132; *Matter of Ryan*, 73 App. Div. 137, 77 Supp. 132.

One who testified that he was an "accident adjuster," and who furnished witnesses in a negligence case with typewritten copies of the testimony they were to give, *held*, not amenable to process as for a civil contempt, at the instance of defendant, because, it having succeeded at the trial, its rights were not defeated, impaired, or injured within the rule. *Noster v. Metropolitan St. Ry. Co.*, 30 Misc. 722, 63 Supp. 501.

On a finding that the failure of a witness to obey a subpoena was "calculated" to defeat, impair, impede or prejudice the rights or remedies of the parties who subpoenaed him, but that in fact it did not do so for the reason that they succeeded in the action, the court has no power to

fine the witness with a view of compensating the party for damages sustained by reason of a failure to attend.

Under such circumstances the court should adjudge the witness guilty of contempt and fine him the costs of the special proceeding to punish him, and a further sum, not exceeding \$250, the limitation prescribed by law, sufficient to compel respect to the dignity of the court and to serve as a warning to others.

A witness who refuses or neglects to obey a subpœna cannot escape punishment upon the ground that the party who subpœnaed him was successful in the action. A witness who fails to obey a subpœna cannot escape punishment because the counsel advised him that the service was not valid. *People ex rel. Springs v. Reid*, 139 App. Div. 551.

A committee of a board of supervisors has power to subpœna a witness, but neither the Supreme Court nor a judge thereof can punish as for a contempt, disobedience of the command. Where a person fails to obey such subpœna any judge of the court may issue a warrant commanding the sheriff to apprehend the defaulting witness and bring him before the committee. But where the official term of all the supervisors composing the committee has expired before the issuing of the warrant, committee has no power to act further and the judge has no power to issue the warrant. *Matter of Supt. of the Poor of Westchester Co.*, 6 App. Div. 144. Proceedings to punish a witness for refusing to testify before a committee of the board of supervisors must be instituted and carried on before a judge and not before a Special Term of the court. The provisions of section 2266 apply only to a civil action or special proceeding pending in court, and have no application in the case of a witness subpœnaed to appear before a committee of the board of supervisors, *People ex rel. Stitz v. Rice*, 57 Hun, 62, 10 Supp. 272.

Chapter 91 of the Laws of 1875 provided for a commission created by legislative action to investigate the affairs of the canals of the State, and that in case of the refusal of a witness to obey the subpœna, he should be brought before the commission by attachment; and that "the like proceedings shall thereupon be had as if such commission was a court of record, and such witness had been duly subpœnaed to attend before it." *Held* (1) that the act was not in conflict with the constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law; (2) that the act was not in conflict with section 17 of article 3 of amended Constitution, providing that no act shall be passed which shall enact that any existing law shall be deemed a part of or applicable to the said act, except by inserting it therein; (3) that the said commission was empowered to issue subpœnas to enforce the attendance of witnesses and to compel the production of books and

papers, and to adjudge any person willfully refusing to produce such books or papers guilty of contempt, and to commit him therefor. *People v. Learned*, 5 Hun, 626.

A mandate issued under section 920 of the Code of Civil Procedure by a notary public of the State of New York, appointed under the laws of another State, a commissioner to take the testimony of a witness residing in the State of New York in an action pending in such other State, which recites that certain pertinent and proper questions were propounded to the witness and that the witness refused and continues to refuse to answer each and every of said questions, but does not in terms adjudge the witness guilty of contempt; and which commands the city marshal to place the witness in the custody of the sheriff, and directs the sheriff to receive him into his custody and to confine him in the county jail "until he shall submit to answer the said question, and each thereof, so put to him by counsel for plaintiff in said action, or is otherwise discharged according to law," does not constitute due process of law and is void. *People ex rel. McDonald v. Leubischer*, 34 App. Div. 577; appeal dismissed, 157 N. Y. 721.

Sections 854 and 855 of the Code do not apply to the case of a recalcitrant witness before a commissioner appointed to take testimony to be used in an action in another State, as that is provided for by section 920. The justice who issued a subpoena requiring a witness to appear before a commissioner appointed by a foreign court to take testimony in this State has no power to hear or determine an application to punish a witness for refusing to answer questions upon his examination, but such power is confined to the officer before whom he was required to appear. *Matter of Searls*, 155 N. Y. 133, 49 N. E. 938, 27 Civ. Pro. 192, rev'g 22 App. Div. 140, 48 Supp. 60, 82 St. Rep. 60.

Witnesses examined in this State under a commission issuing out of the Superior Court of Massachusetts, in an action to enjoin the infringement of plaintiff's trade-mark, may not be excused from answering questions upon the ground that their answers would tend to show a violation of an injunction theretofore granted in the action, which would merely subject the offender to the consequences of a civil contempt.

The fine or imprisonment that might be imposed for a violation of the injunction has no reference to the "penalty" mentioned in section 837 of the Code of Civil Procedure, which excuses a witness from giving an answer that will tend to "expose him to a penalty or forfeiture." *Russie Cement Co. v. Woolworth & Co.*, 68 Misc. 454, 125 Supp. 82.

The treasurer of a corporation, who, not appealing from an order for his examination before trial, refused to comply with a provision of the order that he should produce certain books of the corporation to refresh

his recollection, upon the ground they would tend to incriminate him, *held* guilty of contempt. *Pray v. Blanchard Co.*, 95 App. Div. 423, 88 Supp. 650.

The act of an under sheriff, charged with service of a subpoena *duces tecum* directing a person to appear before the grand jury, in endeavoring to persuade the witness not to produce the book and papers called for in the subpoena, but to destroy them, is punishable as a criminal contempt, although the attempt to persuade the witness was unsuccessful. *People ex rel. Drake v. Andrews*, 197 N. Y. 53, rev'g 134 App. Div. 32.

Subd. 5. Contempts in Connection with Receiverships and Receivers.

Upon a motion to punish a receiver of a partnership, who was also one of the executors of a deceased partner, and was ordered by the court to turn over the property to a corporation, upon the production of a bond "to pay to said executors upon demand any damage or recovery that may be had against said executors on account thereof, or on account of the rents, profits," etc., *held*, that a refusal to deliver upon tender of a bond to him as receiver and executor and testamentary trustee, to pay to him any damages, etc., had against "said obligee," did not constitute a contempt, the bond not being in strict compliance with the order; though the bond had been approved by the judge before whom the order was obtained. *Held*, also, that a refusal of the Special Term to punish for contempt the corporation for taking possession of certain of the assets of the partnership, being in the discretion of the court, would not be interfered with. *Held*, also, that as the order did not state upon what ground the motion was denied, it must be sustained if justified upon any ground. *Witherbee v. Witherbee*, 55 App. Div. 181, 66 Supp. 1036.

A receiver cannot be sued without the consent of the court which appointed him, and to do so is a contempt. On the other hand, a receiver cannot ordinarily sue without leave of court, and if he does, and is unsuccessful, he is liable for costs. *De Groot v. Jay*, 30 Barb. 483; *Taylor v. Baldwin*, 14 Abb. 166; *Phelps v. Cole*, 3 Code Rep. 157; *Smith v. Woodruff*, 6 Abb. Pr. 65.

Where the ejection and exclusion of a receiver from the possession of a liquor saloon, and of the assets of a firm, including a lease, claimed under a chattel mortgage, was excused, and the defendants ordered to restore such possession, the disobedience of such further order, *held*, to make them liable for contempt and fine for the amount of loss claimed to have been sustained by the receiver. *Levy v. Stanion*, 43 App. Div. 619, 59 Supp. 306.

The bringing of an action of trespass against one who entered under an order appointing him a receiver of the property alleged to be tres-

passed upon, with knowledge on the part of plaintiff of the appointment, and without leave of the court, constitutes a contempt. *Greene v. Odell*, 43 App. Div. 608, 60 Supp. 346.

Bringing an action against a receiver without first obtaining leave of the court, to recover back money collected by him under a void order, *held* not a contempt. *Kroner v. Reilly*, 49 App. Div. 41, 63 Supp. 527.

A person whose property has been seized by a receiver when not in the possession of the agents of the receiver may maintain an action against the latter, without leave of the court first obtained, and is not chargeable for contempt in so doing, he not being a party to the supplementary proceedings in which the receiver was appointed. *Brein v. Light*, 36 Misc. 112, 72 Supp. 1087.

The wilful refusal of a receiver to obey an order of the court, requiring a payment by him out of funds in his hands as receiver, is a disobedience by a person "appointed to perform . . . ministerial services" of a lawful order of the court, and a misdemeanor in his office and wilful neglect of duty therein within the meaning of section 1 of that portion of the Revised Statutes relating to "proceedings as for a contempt." It is proper practice in such case for the court to grant an order for the receiver to show cause "why he should not be punished for the alleged misconduct." *Clark v. Binninger*, 75 N. Y. 344.

In an action to foreclose a mortgage, to which the mortgagor, his lessee, and the monthly subtenant of the latter were made parties, an order was made, upon notice to all the defendants, appointing a receiver of the rents and profits, from which the lessee appealed, and thereafter demanded the rents of the subtenants, and upon their refusing to pay, instituted summary proceedings for their eviction, *held*, that he was guilty of a contempt, though he acted under the advice of counsel in attempting to litigate the rights of the receiver in the summary proceedings. *Coffin v. Burstein*, 68 App. Div. 22, 74 Supp. 274.

Refusal of a tenant who had in good faith paid five months' rent in advance to the mortgagor, after the beginning of a foreclosure suit but before the appointment of a receiver, to pay again to the latter, *held*, not a contempt. *Krakower v. Lavelle*, 37 Misc. 423, 75 Supp. 779.

Order punishing tenant, who claimed to have paid rent in advance for contempt in disobeying order directing her to pay over to receiver rents collected by her, sustained in part. *Moore v. Smith*, 70 App. Div. 614, 74 Supp. 1089.

In an action for the dissolution of a partnership where defendant did not appeal from or move to vacate an order directing him to deliver certain formulas to the receiver appointed, he is guilty of contempt in disobeying the order on the ground that it was unauthorized. *Lawson v. Tyler*, 98 App. Div. 10, 90 Supp. 188.

The act of a third person in paying over to the sheriff moneys in his possession belonging to the judgment debtor cannot be punished as a contempt by a subsequently appointed receiver as his remedies are not impaired thereby where a present demand by the receiver is not shown. *Gerson v. Berti*, 87 N. Y. Supp. 458.

Where a person, who was in possession of mortgaged premises, as a tenant, prior to the commencement of an action to foreclose the mortgage, was not made a party to the action to foreclose the mortgage, he cannot be adjudged guilty of contempt for refusing to comply with the provisions of an order made in the foreclosure action appointing a receiver of the rents and profits of the mortgaged property *pendente lite*, unless a copy of such order is formally served upon him. The exhibition by the clerk of the receiver of a certified copy of the order to such a person is insufficient.

In any event, the court in the contempt proceeding has no power by summary order to require such person to pay the receiver a sum of money which the receiver claims as rent of the premises, as such sum can only be collected by action. *American Mortgage Co. v. Sire*, 103 App. Div. 396, 92 Supp. 1082.

Failure of a grantee, adjudged in a creditor's suit to have taken under a transfer fraudulent and void as to creditors, to pay to the receiver of the grantor appointed in sequestration proceedings the value of the property transferred as directed by the judgment in the creditor's suit, *held*, not to subject such grantee to contempt proceedings under the Code of Civil Procedure, section 1241, subdivision 4, since the money was to be paid to the receiver, not as receiver, but as the holder of the legal title to the grantor's property.

In order to sustain contempt proceedings, the warrant or order to show cause must be based upon a personal demand by the receiver. *Gen. Elec. Co. v. Sire*, 88 App. Div. 498, 85 Supp. 141.

A lessee of mortgaged premises who, not being a party to an action of foreclosure, nor receiving notice when a receiver was appointed, was afterward made a party and received notice, and claiming to have paid his own rents in advance, proceeds to collect rents from subtenants, acting under advice of counsel, is guilty of contempt, and his counsel is also properly punishable. *Fletcher v. McKeon*, 74 App. Div. 231, 77 Supp. 465.

Where a receiver willfully refused to obey an order of the court directing him to pay over moneys in his hands as such, it is the proper practice to grant an order to show cause, and give the receiver an opportunity to be heard; and there must be an adjudication that he is guilty of misconduct before he can be punished. So held under Revised Statutes. *Clark v. Bining*, 75 N. Y. 344.

Subd. 6. Contempts by Attorney for Non-Payment of Money.

The method of procedure against an attorney for non-payment of moneys due a client is very fully considered under the title "Attorneys," and precedents are there given.

An attorney employed in that capacity who collects or receives money for his client and refuses to pay it after demand made over is punishable as for a contempt. *Matter of Bleakly*, 5 Paige, 311; *Matter of Dakin*, 4 Hill, 42; *Wilmerdings v. Fowler*, 14 Abb. Pr. N. S. 249; *People v. Smith*, 3 Caines, 221; *People v. Wilson*, 5 Johns. 368; *Bohanan v. Peterson*, 9 Wend. 503; *Ex parte Ferguson*, 6 Cow. 596; *Matter of Steinert*, 24 Hun, 246; *Ex parte Staats*, 4 Cow. 76. An attorney is also liable for contempt for appearing for a defendant and confessing judgment without authority. *Denton v. Noyes*, 6 Johns. 296. But a client will not be punished for an act done by his attorney without his privity, procurement, or consent. *Satterlee v. DeComeau*, 7 Rob. 666.

Where, after an inquiry, the court has ascertained that an attorney has moneys in his hands belonging to his client, and has ascertained the amount thereof, and has made an order directing their payment, and a copy of the order has been served upon the attorney, and payment has been demanded, he will be guilty of a contempt of court in refusing to obey such order and liable to punishment therefor; but he is not guilty of a contempt until the order has been served and payment demanded; accordingly, an order adjudging the relator in contempt and imposing a fine upon him and his arrest and an order of commitment, in a case where an order has been made requiring him to pay his client certain moneys but never served upon him and without any demand having been made upon him for such payment, are void and the relator should be discharged from imprisonment. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 Supp. 700.

An attorney who actively participates in taking out of the State and beyond the jurisdiction of the court property subject to an attachment levied in an action against a non-resident is guilty of an attempt to defeat a mandate of the court and will be ordered to bring back the property and deliver it into the custody of the sheriff.

An attorney so acting is guilty of contempt although the warrant of attachment was not personally served upon him, if, with knowledge of the facts, he participated in removing the property. *Lowenthal v. Hodge*, 120 App. Div. 304, 105 Supp. 120.

An attorney who has been ordered personally to pay costs on the vacating of an order to examine a debtor on supplementary proceedings cannot be held in contempt for failure to pay when it appears that the debtor on paying the judgment deducted the costs imposed upon the attorney. *Obermeyer & Liebman v. Adisky*, 123 App. Div. 272, 107 Supp. 949.

Subd. 7. Failure to Complete Judicial Sale.

Where an order requires a purchaser at a foreclosure sale to complete the purchase, and the purchaser refuses to obey, the court has power and should, under sections 2266 and 2268, punish such disobedience as a contempt, and should make an order under section 2268 directing that a warrant issue, committing the person to prison until the order is complied with. *Burton v. Lynn*, 21 App. Div. 609.

Where a referee in foreclosure failed to comply with the order, requiring him to pay surplus to the treasurer, and to file his report, it was held that an order was proper adjudging him guilty of contempt, prejudicing the rights of the parties, fining him, and directing his commitment, until payment and compliance with the first order. *Steele v. Gunn*, 3 Supp. 692, 19 St. Rep. 654.

Failure of a purchaser at a foreclosure sale to comply with an order for a resale requiring him to pay to the referee any deficiency between his bid and the sum realized on the resale, together with the costs and expenses, and any taxes, water rates, or assessments which had become liens in the interval, cannot by itself be a foundation for a proceeding for contempt under the Code of Civil Procedure, section 14, subdivision 3, where the order does not adjudge any specific sum to be paid. *Rowley v. Feldman*, 66 App. Div. 463, 73 Supp. 385.

An order for the payment of the difference between the bid made by a defaulting purchaser at a sale in foreclosure and the price fetched at the resale, cannot be enforced by proceeding for contempt of court. *Leslie v. Saratoga Brewing Co.*, 33 Misc. 118, 67 Supp. 222; aff'd, 59 App. Div. 624.

Where a purchaser at a judicial sale of real property refused to complete his purchase, it was held that the plaintiff in the action did not waive his right to institute contempt proceedings against the delinquent purchaser, by obtaining authority to resell the premises instead of instituting contempt proceedings immediately upon the delinquent purchaser's failure to complete his purchase. *Rowley v. Feldman*, 84 App. Div. 400, 82 Supp. 679.

A motion to punish a purchaser at a foreclosure sale for a contempt in having failed to comply with an order directing him to complete must be made by an order to show cause and is fatally defective if made on notice of motion.

The papers are fatally defective where they fail to show any facts from which the court can adjudge that any right or remedy of the plaintiff has been defeated, impaired, impeded, or prejudiced. *Dunlop v. Mulry*, 40 Misc. 131, 81 Supp. 260.

Where money is directed to be paid into court or to an officer of the court no demand is necessary other than the service of the order directing such payment.

An order directing a purchaser of mortgaged premises, at a sale under a judgment of foreclosure, to pay the balance of his bid to the referee who made the sale, is not within the provisions of section 779 of the Code of Civil Procedure, authorizing an execution to issue in certain cases.

Where, as a condition of granting a stay of proceedings, an undertaking is required to be given and one is given, but the sureties are expected to and fail to justify, such failure is equivalent to a failure to give the required undertaking. *State Bank v. Wilchinsky*, 65 Misc. 162, 119 Supp. 131.

Subd. 8. Contempt by Putting in Fictitious Bail or Surety.

Code of Civil Procedure, section 14, provides that a court of record may punish, by fine and imprisonment, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action may be defeated or prejudiced, in the following cases: (2) A party to an action for putting in fictitious bail or surety; (8) in any other case where a proceeding to punish for contempt has usually been adopted to enforce a civil remedy of a party to an action, or to protect the rights of a party. *Held*, that a surety on an appeal bond, who made a false affidavit as to his responsibility in order to deceive the court, there having been an adjudication that by such misconduct he had prejudiced the rights of a party — was punishable for contempt. *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Light Co.*, 68 App. Div. 414, 74 Supp. 486; *Fitzgerald v. Moffett*, 68 App. Div. 414, 74 Supp. 486.

The making of a false affidavit as to his sufficiency by a surety upon a bond given to discharge a mechanic's lien, is a contempt of court, though he was not examined at the time of his justification, and will be punished accordingly. *Matter of Sheppard*, 33 Misc. 724, 68 Supp. 974.

Under subdivision 2 of section 14 of the Code of Civil Procedure, putting in a fictitious surety by which the right of remedy of a party to a civil proceeding may be defeated, impaired, impeded, or prejudiced, is a civil contempt; and it is enough to show that the party moved against did any of these things in order to make it incumbent on him to exonerate himself.

In a proceeding to punish a corporation for contempt in filing a bond with fictitious sureties, the president who executed the bond in the corporate name is a proper party.

In such proceeding any right to an examination by oral testimony is waived by submitting the case on affidavits without request for such examination. *Matter of Westchester Realty Corp.*, 123 App. Div. 797.

Where a person who executed a bond to discharge a mechanic's lien is sought to be adjudged guilty of contempt because of his alleged insolvency at the time he executed the bond and the affidavit of justification, it is incumbent upon the moving party, in view of the fact that the proceeding operates to deprive the defendant of his right to a trial by jury, to show his insolvency at the time in question beyond a reasonable doubt, and also that he has been guilty of perjury. *Johnson v. Austin*, 76 App. Div. 312, 78 Supp. 501.

On a motion to punish a corporation and its president for contempt in furnishing fictitious sureties on a bond given to discharge a mechanic's lien, a finding that the defendants knew of the fictitious character of the sureties is warranted when it appears that the bond was obtained from one engaged in the business of furnishing straw bail, and that the bond was paid for by the defendants. *Matter of Westchester Realty Corp.*, 123 App. Div. 797.

An undertaking given for the purpose of perfecting an appeal to the County Court from a judgment rendered in a justice's court, the sole surety upon which is an infant, is fictitious, and a person who knowingly gives such an undertaking may, where the surety has successfully interposed the defense of infancy to an action upon the undertaking, be properly adjudged guilty of contempt of court whereby the right or remedy of the obligee has been defeated, impaired, and prejudiced.

Semble, however, that in such a case the court may, in its discretion, refuse to adjudge the person giving the undertaking guilty of contempt. *Hall v. Lanza*, 97 App. Div. 490, 89 Supp. 980.

An attorney who procured an order of arrest upon an undertaking with knowledge that one of the sureties was fictitious or insolvent, and the other not worth sufficient property to warrant his justifying as a surety, is properly punished for contempt by fine to the amount of the judgment obtained against the sureties and \$10 costs of the motion.

The surety who had insufficient property and testified falsely in relation thereto, upon his justification, is guilty of a contempt, as of unlawful interference with the progress of the action. *Nuccio v. Porto*, 72 App. Div. 88, 76 Supp. 96.

In case of the plaintiff procuring an order of arrest by imposing an undertaking with worthless sureties upon the court, it was held that the plaintiff or attorney and sureties should be fined in the amount of the judgment recovered upon the undertaking, and in default thereof, imprisonment for a period of three months. *Foley v. Stone*, 15 Civ. Pro. 224.

The court has power to punish as a contempt the act of a surety in becoming such upon an undertaking given in the action at a time when he knows he is insolvent, and has no expectation of paying the liability

thus incurred. *Simon v. Aldine Publishing Co.*, 12 Civ. Pro. 290, rev'g 11 Civ. Pro. 267. The contrary, however, is held in *Norwood v. Ray Mfg. Co.*, 11 Civ. Pro. 273.

A surety who, while insolvent, verifies an affidavit of justification on an undertaking imposed as a condition for granting an injunction, may be punished as for a contempt of court.

On a finding that such act actually did defeat, impair, impede, and prejudice the rights and remedies of a party to the action, the offender may be adjudged guilty of contempt, fined the amount of the judgment, and committed to the county jail on a failure to pay. *Matter of Woods*, 134 App. Div. 361.

Where no appeal was taken from the order of confirmation of a referee's report which found as a fact that when the defendant made affidavit he was not served with the summons and complaint he swore falsely and acted deceitfully, the court, for the purposes of a motion to punish defendant for contempt, must assume that defendant had been served.

Where, upon a motion to vacate a judgment by default, defendant swears in his moving affidavit that he was not served with the summons and complaint and obtains the evidence of others in corroboration and thereon obtains a stay of all proceedings upon the judgment, and upon a reference it is found as a fact that he was properly served with the summons and complaint, he is guilty of practicing "deceit" upon the court within the meaning of section 14 of the Code of Civil Procedure and is punishable as for a civil contempt. *Dollard v. Koronsky*, 61 Misc. 392, 113 Supp. 793.

Where an undertaking is given as a condition of setting aside the levy of an execution pending a motion to vacate the judgment upon which the execution was issued, conditioned for the payment of the judgment and the expenses of a reference to take proof in aid of the motion, and the surety upon the undertaking disposes of his property with the deliberate intention of making his obligation nugatory and succeeds in doing so, his conduct is a direct interference with the action as well as with the ultimate proceedings in aid of the judgment, impedes the administration of justice, impairs and defeats the right of the plaintiff, and comes within the provisions of the Code of Civil Procedure defining a civil contempt.

In such a case, the fine to be imposed should include legal expenses and counsel fees in the contempt proceedings; and a counsel fee of \$30 a day for a period of twenty-four days is not unreasonable. *Dollard v. Koronsky*, 64 Misc. 611, 118 Supp. 922.

The surety on a undertaking given to release the levy of an execution who has deliberately divested himself of all property in order to prevent the enforcement of his liability cannot be punished for contempt of court. *Dollard v. Koronsky*, 138 App. Div. 213, 123 Supp. 11, aff'g 67 Misc. 90; aff'd, 199 N. Y. 558.

Subd. 9. Contempts in Matrimonial Actions. Code Civil Procedure, § 1773.

§ 1773. Id.; When enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court, other than a criminal contempt. Such an order to show cause may also be made without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

Failure to pay alimony is punishable under section 1773 of the Code by proceedings as for a contempt. The authorities on the subject together with precedents will be found in *Fiero on Special Actions*, vol. 2, p. 1193; hence, only a few of the later decisions on the subject are given in this connection, and reference is had to the special actions for authorities on the subject and method of procedure in that class of actions.

An order to show cause in a contempt proceeding in a matrimonial action does not require to be served in any different manner than such an order in any other action, and service of the order upon the attorney for the party is sufficient. *Carr v. Carr*, 64 Misc. 435, 118 N. Y. Supp. 625.

Section 1773 of the Code of Civil Procedure, regulating proceedings to punish a defendant for contempt for failure to pay alimony, is exclusive, and a plaintiff should proceed thereunder rather than under section 2268, relating to contempts in general.

It follows that a proceeding to punish for contempt for failure to pay alimony must originate on an order to show cause.

Although a court order cannot be reviewed by a court of co-ordinate jurisdiction, yet an order punishing a defendant for contempt in failing to pay alimony made by a judge or court without authority and without notice, may be vacated by the court on notice.

A defendant who pays alimony after having been arrested under a void order adjudging him in contempt pays under duress and is not estopped from moving to vacate the order. *Stewart v. Stewart*, 127 App. Div. 724, 111 Supp. 734.

Under title 3 of chapter 17 of the Code of Civil Procedure which, by the terms of section 1773 of that Code, governs contempt proceedings instituted for a failure to pay temporary alimony, it is necessary that a personal demand be made upon the defendant for the payment of the alimony, and that the order to show cause why he should not be punished for contempt be served upon him personally. Service of the order to show cause upon his attorney is not sufficient. *Goldie v. Goldie*, 77 App. Div. 12, 79 Supp. 268, 12 Anno. Cas. 175.

The enforcement of the payment of alimony by proceedings for contempt is governed by section 1773 of the Code of Civil Procedure and not by the general provisions of section 1241.

Failure of a husband to comply with an order requiring him to give security for the payment of alimony does not subject him to imprisonment for contempt, as the remedy of sequestration provided in the Code of Civil Procedure, sections 1772, 1773, is exclusive. *People ex rel. Ready v. Walsh*, 132 App. Div. 462, 116 Supp. 839.

For failure of a husband to comply with the provisions of an agreement entered into by him after a divorce decree as to a payment of a gross sum as advance alimony and for periodic installments less than the rate fixed in the decree, he cannot be punished for contempt, and the wife is left to her action on the contract, where contempt proceedings under the decree would be ineffectual because the advance payment was full compliance with the decree up to the time of breach of the agreement. *Clark v. Clark*, 130 App. Div. 610, 115 Supp. 500.

Inability of a husband to pay is not an answer to an application to punish for contempt in failing to pay alimony. *Cahzin v. Cahzin*, 112 Supp. 525.

On a motion to punish one for contempt in failing to pay alimony, a demand for the amount due must be shown. *Compton v. Compton*, 125 App. Div. 859, 110 Supp. 75.

An order to show cause why a husband should not be punished for contempt in not paying alimony awarded *pendente lite* will not be granted unless it is shown that sequestration or an order to give security will be ineffectual, but where he was excused from paying a counsel fee upon the ground of poverty a presumption to that effect may be entertained and he may be adjudged in contempt in the discretion of the court which may be exercised by the Appellate Division. *Uttal v. Uttal*, 140 App. Div. 255, 125 Supp. 2.

A demand for the payment of alimony by a person authorized to receive it is necessary before proceedings for contempt in failing to pay it. Proof of a demand by the clerk of the attorney for the wife in the action, whose authority ceased with the entry of judgment, is not sufficient without showing new authority and notice thereof to the delinquent. *Conklin v. Conklin*, 113 App. Div. 743, 99 Supp. 310.

A motion to punish defendant for contempt in failing to pay alimony after due demand should not be denied on the ground that he has moved to set aside a judgment taken by default. *Knauer v. Knauer*, 121 App. Div. 748.

Notwithstanding adultery by the wife, the husband cannot refuse to make payments of alimony under a decree of separation until the decree

has been modified, and if he does so he is guilty of contempt. *Ronan v. Ronan*, 32 Misc. 467, 66 Supp. 799.

The termination of an action for divorce by its dismissal by consent, *held*, not to relieve the plaintiff from liability to pay past due alimony, and the court had power to commit him for contempt for failure to pay it, but not for failure to pay costs, expenses, fees, and charges in the action. *Shepard v. Shepard*, 99 App. Div. 308, 90 Supp. 982.

An order amending a judgment of divorce by increasing the amount of alimony and requiring defendant, who was non-resident, to give a bond as security for payment, was entered and served upon the attorney, who had appeared, for him in the action but not upon defendant in person; *held*, that the court did not acquire jurisdiction to adjudge defendant guilty of contempt for non-compliance with the terms of the order. *Keller v. Keller*, 100 App. Div. 325, 191 N. Y. 528.

An order denying a motion to punish defendant for contempt for his failure to pay alimony, both parties having remarried, and plaintiff having custody of their child, reversed, the judgment being in force and unmodified. *Compton v. Compton*, 111 App. Div. 923, 97 Supp. 618.

Where, in an action for a separation, brought by a wife against her husband, the final judgment directs the defendant to pay to the plaintiff's attorney a fixed sum as and for her costs and counsel fees, the failure of the defendant to make such payment cannot be treated as a contempt, authorizing his commitment until he shall pay the said amount *Jacquín v. Jacquín*, 36 Hun, 378.

A husband who refuses to pay alimony which accrued pending an unsuccessful appeal, after due service of the order and demand for payment, should be punished for contempt.

Where such motion was denied and there is no issue of fact owing to the absence of opposing affidavits in the court below, the Appellate Division will make the determination which the Special Term should have made and find that the defendant committed the offense, and that it was calculated to and actually did defeat, impair, impede, and prejudice the rights of the plaintiff. *Wallace v. Wallace*, 140 App. Div. 800.

Where the defendant in a divorce action, during the progress of the trial, wrote an article relating in part to the trial and in part containing his own views of the facts, and setting forth in full two letters which had been offered in evidence, excluded and marked for identification, the first sentence of which article showed that it did not purport to be a statement of proceedings on the trial, and sent it to several newspapers accompanied by a letter which also showed that the article was not confined to an account of the court proceedings, he cannot, on the publication of the article, be punished for a criminal contempt because of the publication of the letters and on the theory that he represented the entire statement to be an account of the proceedings on the trial.

Such an adjudication can only be sustained by showing that the defendant published a grossly inaccurate account of the proceedings on the trial. *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 Supp. 852.

A person who has been committed for contempt for failure to pay alimony *pendente lite*, and has been released after serving the term of imprisonment prescribed by section 111 of the Code of Civil Procedure, cannot be rearrested for a failure to pay alimony subsequently accruing. *Maran v. Maran*, 137 App. Div. 348, 122 Supp. 9.

The provision of section 111 of the Code, limiting the duration of imprisonment for non-payment of alimony and counsel fees, is applicable as well to temporary alimony granted by an interlocutory order as to permanent alimony granted by a final judgment in a divorce case. *Richards v. Richards*, 71 Misc. 532.

The word "alimony" as used in section 111 of the Code, with no qualifying adjective, means alimony of either kind, whether granted by interlocutory order or by final judgment. The positive command of the statute that "the prisoner shall not be again imprisoned upon a like process issued in the same action" refers to both temporary and permanent alimony.

One who has served a full term of imprisonment under a commitment for failing to pay certain installments of temporary alimony awarded by an interlocutory order in an action for a separation cannot be again imprisoned under a commitment for contempt in failing to pay later installments which had become due under the same order. *People ex rel. Levine v. Shea*, 201 N. Y. 471.

An order adjudging a defendant in contempt for failing to pay alimony *pendente lite* will be reversed if it contain no finding that the failure to pay was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of the plaintiff, as required by sections 2283 and 2281 of the Code of Civil Procedure. *Schweig v. Schweig*, 122 App. Div. 787, 107 Supp. 905.

Under the Code of Civil Procedure, section 1773, a proceeding for contempt is especially authorized to enforce a judgment directing the payment of alimony, and the case is taken out of the general rule prescribed by section 1241; and where there has been personal service of a certified copy of the decree and a personal demand, a motion to punish the defendant as for contempt is properly granted. *Stanley v. Stanley*, 116 App. Div. 544, 101 Supp. 725.

After a judgment of an absolute divorce in favor of the wife had been rendered, but at or immediately before its entry, the parties entered into an agreement for the payment of a less sum as alimony than that provided in the decree; *held*, that an order for contempt in not paying the

additional amount, the sum agreed upon having been paid, would not be granted, pending a reference to ascertain defendant's pecuniary ability. *Goodsell v. Goodsell*, 94 App. Div. 443, 88 Supp. 161.

An order requiring a husband to show cause why he should not be punished for his failure to pay a sum of money, which he is required to pay by a judgment rendered or an order made in an action for divorce or separation, must be made by the court; and an order adjudging the defendant guilty of contempt and committing him to the common jail, founded upon an order to show cause made by a judge, is without jurisdiction and void. *Weich v. Weich*, 59 Misc. 238, 110 Supp. 301.

In an action to procure a separation on the ground of cruelty and failure to support plaintiff, after issue had been joined an order was made directing defendant to pay alimony and counsel fee, which he did not comply with and left the State, was adjudged in contempt, and his answer was struck out; *held*, that his motion to reduce the amounts directed to be paid, to vacate the order adjudging him in contempt, and to reinstate his answer, would not be entertained until he submitted himself to the jurisdiction of the court. *Sibley v. Sibley*, 66 App. Div. 552, 73 Supp. 244.

In adjudging a husband in default for failing to pay alimony, the court should find and adjudge that his failure tended to and did defeat, impair, impede, and prejudice the rights of the wife. *Krauss v. Krauss*, 127 App. Div. 743, 111 Supp. 790.

Subd. 10. Contempts in Supplementary Proceedings. Code Civil Procedure, § 2457.

§ 2457. Disobedience to order; how punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee in the course of the special proceedings; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge or by the court out of which the execution was issued, by the county judge, the special county judge, or the special surrogate of the county to which the execution was issued, or by the city court of the city of New York or a justice thereof, if the proceedings were instituted before such court or any justice thereof, as for a contempt.

The authorities under this section are cited and the practice given under "Supplementary Proceedings."

Subd. 11. Contempts in Surrogate's Court. Code Civil Procedure, §§ 2481, 2555, 2579, 2602, 2709.*

§ 2481. Incidental powers of the surrogate.

Sub. 7. To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish for a similar contempt, in like manner.

* The practice in Surrogate's Court is given in order that the subject of contempts may be fully treated.

§ 2555. Enforcement of decree by punishment for contempt.

In either of the following cases, a decree of a surrogate's court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court.

1. Where it cannot be enforced by execution, as prescribed in the last section.
2. Where part of it cannot be enforced by execution; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.
3. Where an execution, issued as prescribed in the last section, to the sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied.
4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties in his official bond.

§ 2579. Security to stay proceedings in case of commitment.

An appeal from a decree or an order directing the commitment of a person refusing to obey a subpoena or to testify when required, according to law, does not stay the execution of the decree or order appealed from unless the appellant gives an undertaking as therein prescribed.

§ 2602. Surrogate may direct as to custody, where co-executors, etc., disagree.

Disobedience to the direction made by the surrogate, with regard to the custody of property where dispute arises between coexecutors, may be punished as for a contempt.

§ 2709. Examination and decree.

A refusal to attend or be sworn, or to answer a question which the surrogate determines to be proper in a proceeding for a discovery in aid of the executor or administrator, is punishable in the same manner as a like refusal by a witness subpoenaed to attend a hearing before the surrogate.

Since the enactment of the Code of Civil Procedure, section 2555, in 1880, disobedience, by an executor, of a surrogate's decree directing the payment of money generally, and not out of a specific account, is punishable as a contempt. *Matter of Holmes*, 79 App. Div. 267, 79 Supp. 687; aff'd, 176 N. Y. 604.

An executor who is indebted to the estate of his testator, upon a claim not resting in tort, and who is insolvent and unable to pay the amount in which he has been adjudged to be thus indebted, is not liable to punishment, as for a contempt, because of his not paying it. *Matter of Ockershausen*, 59 Hun, 200, 13 Supp. 396.

Where the alleged contempt consisted of neglect to pay a debt adjudged to be due the estate from the executor, it was held that the burden was upon the executor to prove his defense of insolvency. *Matter of Strong*, 111 App. Div. 281, 97 Supp. 459; aff'd, 186 N. Y. 584.

Testamentary trustees having rejected an investment made by the executor, and he failing to pay over the amount in money as directed by the surrogate for more than ten days after the decree, *held*, that he was in contempt and properly fined the amount of interest accrued since the decree. *Matter of Ryer*, 120 App. Div. 154, 104 Supp. 804.

Costs awarded to a special guardian against a temporary administrator cannot be enforced by contempt proceedings. *Matter of Grant*, 130 App. Div. 706, 115 Supp. 283.

The surrogate will not discharge from custody a testamentary trustee, imprisoned for contempt, in failing to make a payment ordered, on his mere statement of his inability to pay. *Matter of Geyer*, 62 Misc. 443, 116 Supp. 800.

In *People v. Marshall*, 7 Abb. N. C. 380, will be found a discussion and history of the power of courts of probate and chancery to imprison for contempt for non-payment of decrees. In *Estate of Sherry*, 7 Abb. N. C. 390, it is said that an attachment against an executor or administrator for non-payment of money as required by a surrogate's decree cannot be issued unless it be shown that he had funds in his hands at the time of the decree, citing *Watson v. Nelson*, 69 N. Y. 536. The same rule is laid down in *Stockbridge's Assignment*, 7 Abb. N. C. 395, relative to assignment for the benefit of creditors. *Slawson v. Schlessinger*, 7 Abb. N. C. 399, holds that payment of costs awarded against an infant may be enforced by attachment against guardian *ad litem* as a matter of course and of legal right. In *Matter of Watson*, it is held that a surrogate's power to enforce a decree did not authorize him to inflict a fine and then commit upon the fine. Appeal dismissed in 69 N. Y. 536, after a full discussion of the subject in the opinion. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce performance of it by attachment. *Dunford v. Weaver*, 84 N. Y. 445. In order to punish a person for contempt for non-payment of money ordered by the court to be paid, the personal demand required by the Code, section 2555, must be shown by affidavit. It must be a demand by or on behalf of the party to whom the order required the payment to be made. *Matter of Gilman*, 15 St. Rep. 718. An attachment cannot be based upon disobedience of an order without proof of personal service. *Matter of Barnes*, 1 Civ. Pro. 59. An executor who is indebted to the estate of the testator and who is unable to pay the amount which it has been adjudged he is indebted will not be adjudged in contempt where he is not able to pay it. *Matter of Ockershausen*, 59 Hun, 200. A direction that an executor pay an allowance to a guardian *ad litem* is one which can be enforced by contempt proceeding. *Beckett v. Place*, 12 Misc. 323. Personal property specifically bequeathed to an executor is subject to application upon the debts of the testator's estate where there is a deficiency of assets; and for

a failure to account therefor upon an order of the court he is guilty of contempt of court and is properly fined the appraised value of the property covered by his specific legacy. When this fine is paid by the executor he will, under section 2284, be entitled to credit for the amount. *Matter of Pye*, 18 App. Div. 306; aff'd, 154 N. Y. 773. The Code confers upon the surrogate power to enforce proceedings for contempt for disobedience to a decree directing payment of costs. *Matter of Humfreville*, 19 App. Div. 381; rev'd in 154 N. Y. 115, which holds that section 2555, authorizing the enforcement of certain decrees of Surrogates' Courts by proceedings for contempt, does not apply to proceedings or decrees for the payment of costs only, and such decree of the surrogate is subject to the general provision of section 15, prohibiting imprisonment for non-payment of costs except in actions specified therein. When the only payment of money directed to be made by the decree of the Surrogate's Court removing an executor are costs, it cannot be enforced by imprisonment. All concurring except Gray, J., who holds that the court is committed to an opposite view in *Matter of Dissosway*, 91 N. Y. 235. The granting of an order under section 2555 is in the discretion of the surrogate, but this discretion should not be exercised in favor of a delinquent executor who has been directed to make payment from the money in his hands and who has disobeyed such direction, unless under extraordinary circumstances. The state of facts which, pending one's imprisonment in contempt proceedings, would justify his discharge, would equally justify a denial of the application for his commitment. *Matter of Battle*, 10 St. Rep. 667. A surrogate may make an order directing executor to pay money in his hands after a decree entered upon accounting, and may, if he neglects to comply with the order, and if it does not appear that execution has been issued, arrest the executor on attachment. The executor, on the return of the attachment, may show cause against his commitment. *Saltus v. Saltus*, 2 Lans. 9.

An order of the surrogate directing an executrix to pay judgment is a decree, and can be made a foundation for contempt proceedings. *Matter of Bernhard*, 16 St. Rep. 241. See, also, as to the order directing the payment of petitioner's claim in the proceedings instituted by a creditor under section 717, *Estate of McMaster*, 14 Civ. Pro. 195.

Where the neglect charged was not denied by the executor, but he presented his own affidavits, admitting a conversion by him of the funds of the estate in his hands to his own private business, the transfer of his business and stock in trade and real estate to his wife in payment of an antecedent debt followed by no apparent change in possession or management, and averring in consequence of such transfer insolvency and inability to comply with the decree; *held*, that the surrogate was not necessarily concluded by these averments; also that, granting the order punish-

ing for the alleged contempt rested in discretion, it was not reviewable here, as it did not appear the discretion had been unfairly exercised. *Matter of Judicial Settlement of Snyder*, 103 N. Y. 178.

A person who justifies as a surety on a judicial bond when he is insolvent may be punished for contempt, and if it is determined that his act actually did defeat, impair, impede, and prejudice the rights and remedies of a party to the action, he should be fined the amount of the judgment recovered therein and in default of payment be committed to the county jail. *Matter of Woods*, 134 App. Div. 361, 119 Supp. 69.

A party who recovered a judgment against an administratrix, in the Supreme Court made application to the Surrogate's Court for leave to issue execution thereon. The application resulted in an order from which no appeal was taken adjudging that the administratrix had in her hands funds applicable to the payment of the judgment, and that execution might issue to the extent of the funds so applicable. The execution having been issued and returned unsatisfied, the judgment creditor made an application for a decree directing payment by the administratrix of the sum for which the execution was authorized to be issued. *Held*, that the surrogate had jurisdiction to make the decree and to enforce compliance therewith by contempt proceedings, in the same manner as though the judgment or decree directing the payment of the money had been rendered in the Surrogate's Court instead of in the Supreme Court. *Matter of Mahoney*, 88 App. Div. 140.

It is the duty of an executor, indebted to his testator when he died, if solvent at any time before his final accounting, to pay, as an individual, the debt to himself as executor.

Where a decree has charged him with the debt his failure to comply with the decree is punishable with fine and imprisonment and these the surrogate may inflict. *Matter of David*, 44 Misc. 337, 89 Supp. 927.

Since the enactment of section 2555 of the Code of Civil Procedure the disobedience by an executor of a surrogate's decree, directing the payment by him of money generally and not out of a specific fund, may be punished as a criminal contempt. *Matter of Holmes*, No. 2, 79 App. Div. 267; *aff'd*, 176 N. Y. 604.

The power of a surrogate to inflict a fine and punish an executor by imprisonment for a contempt for his disobedience of the decree is fully established. *Matter of Snyder*, 34 Hun, 302; *aff'd*, 103 N. Y. 178; *Matter of Holmes*, 79 App. Div. 267; *aff'd*, 176 N. Y. 604; *Matter of Pye*, 18 App. Div. 306; *aff'd*, 154 N. Y. 773.

As to the discretion of a surrogate to refuse the remedy, see *Matter of Battle*, 5 Dem. 447; *Matter of David*, 44 Misc. 337.

It is said by Livingston, surrogate, in *Ferguson v. Cummings*, 1 Dem. 433, that the powers conferred by section 2555 should be exercised in

conformity with the liberal spirit of State legislation on the subject of imprisonment for debt. The holding in *Re Dissosway*, 91 N. Y. 235, that contempt proceedings cannot be taken to enforce a decree for payment of money until an execution has been returned unsatisfied, wholly or in part, relates to proceedings defined by the first three subdivisions of the section, and the provisions of section 4 do not require an execution against an executor, etc.; but it is held, in *Estate of Killinger*, 2 McCarty's Civ. Pro. 68, that it is discretionary with the surrogate in such case whether to require the issue and return of an execution; and *Ferguson v. Cummings*, 1 Dem. 433, holds that the issuing of an execution ought not, in the exercise of a sound discretion, to be dispensed with.

A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of sections 2714 and 2552 of the Code of Civil Procedure, conclusive that he has money in his hands, and on his refusal to pay payment may be compelled by contempt proceedings under section 2555 of the Code of Civil Procedure.

In such contempt proceedings the burden is on the executor to show his insolvency, and when he has set up no such defense while contesting his liability to the estate or on successive appeals from the decree, and where his affidavits in answer to a motion to adjudge him to be in contempt do not show that he is unable to pay, an order adjudging him to be in contempt will be sustained.

If insolvent, he may be relieved from imprisonment under section 2286 of the Code of Civil Procedure. *Matter of Strong*, 111 App. Div. 281; aff'd, 186 N. Y. 584.

The surrogate has power to punish an administrator for contempt because of his failure to pay the amount allowed to a special guardian by a decree, and an allegation of inability to pay is no answer. *Matter of Kurtzman*, 2 St. Rep. 655. As to when surrogate can exercise discretion. *Matter of Snyder*, 2 St. Rep. 758. Where an executor was indebted to his testator, and after assuming charge of the estate became insolvent, having accounted, however, for all moneys of the estate received by him, it was held that he was not amenable to contempt proceedings for failure to pay the debt. The provisions of the Code were passed to permit the punishment, by contempt proceedings, of trustees who had embezzled the funds of *cestuis que trust*, and do not change the character of a contract debt due from the executor. *In re Rugg*, 3 St. Rep. 224, citing *Baucus v. Stover*, 89 N. Y. 1.

An administrator ordered to pay costs cannot excuse non-payment by showing he has no assets, *non constat*, but that he has squandered them. *Gillies v. Kreuder*, 1 Dem. 349. In *Matter of Kurtzman*, 2 St. Rep. 655, it is said that whatever doubt there may have been before the Code, as to the right of a surrogate to punish an administrator for contempt, for

non-payment of moneys, there can no longer be any doubt as to such power and its extent. The claim of an executor that he has no funds is too general, and is unavailing. Citing *Matter of Snyder*, 34 Hun, 302; *Matter of Steinert*, 29 Hun, 301. The liability of an executor who was indebted to his testator is not the same as if he had received assets of the estate, and if unable to pay, he cannot be punished for contempt. *Baucus v. Stover*, 89 N. Y. 1. The decisions under the Revised Statutes as to power of surrogate to punish for non-payment of moneys were very conflicting. See *Watson v. Nelson*, 69 N. Y. 536; *People v. Cowles*, 4 Keyes, 46; *Seaman v. Duryea*, 11 N. Y. 324; *Townsend v. Whitney*, 75 N. Y. 425.

A guardian will not be punished for contempt in failing to pay over a balance found due on the accounting, where the moneys were expended in support of a household of which the infant was a member, and the guardian is penniless and in bad health and has offered all her household goods in payment of such balance. *Matter of Lothringer*, 26 Misc. 690, 57 Supp. 950.

Where the decree directs the administratrix, as such, to pay to an infant its entire share and also to the special guardian of such infant an extra allowance, and it appears that there are no funds of the estate from which the latter payment can be made, the failure to make such payment cannot be punished as a contempt. *Matter of Monell*, 28 Misc. 308, 59 Supp. 981. See *Beckett v. Place*, 12 Misc. 323, 33 Supp. 634.

When a foreign corporation is dissolved by judicial decree and a permanent receiver is appointed, it ceases to exist, and an order obtained subsequent to such dissolution decreeing an executrix to be in contempt for failure to obey a direction to pay over moneys to said corporation should be set aside. *Matter of Skelly*, 109 App. Div. 58, 95 Supp. 1076.

A provision in a decree of the Surrogate's Court, rendered upon the judicial settlement of an administrator's accounts, directing the administrator to pay personally a specified amount of costs to the contestants, cannot be enforced by contempt proceedings instituted pursuant to section 2555 of the Code of Civil Procedure.

While the language of such section may be broad enough to authorize the institution of contempt proceedings in such a case, it must be construed in connection with section 15 of the Code of Civil Procedure, which prohibits imprisonment for non-payment of costs except in the cases therein specified. *Matter of Banning*, 108 App. Div. 12, 95 Supp. 467.

Where, after a hearing, an executrix was adjudged guilty of contempt of court for willful disobedience of an order of the Surrogate's Court directing her to pay over several thousand dollars belonging to the estate, found to be in her hands upon an accounting after the letters testamentary granted to her had been revoked; and where she was committed under

section 774 of the Judiciary Law to the county jail, to be there detained until she should pay the money as directed by the order of the surrogate, her application to be discharged on habeas corpus, on the ground that six months had expired since her commitment, should be denied.

An application for the discharge of relator upon the ground that she is unable to comply with the order requiring her to make payment of the money under section 775 of the Judiciary Law is not properly before the court in proceedings for a writ of habeas corpus to test the legality of relator's confinement. *People ex rel. Dean v. Markell*, 72 Misc. 427.

The response by an executor to an order requiring him to file an account, by filing a printed blank with the word "nothing" written in each of the schedules, on the contention that he was no longer acting as executor, *held* a contempt of court. *Matter of People's Trust Co.*, 37 Misc. 239, 75 Supp. 254.

The implied authority of an attorney does not extend to permit him to bind his client, an executor, to liability for a criminal contempt, in procuring the improper satisfaction of a decree without the actual privity of his client. *Matter of Feehan*, 36 Misc. 614, 73 Supp. 1126.

The executor having been adjudged to pay to the petitioners an amount determined to belong to them by virtue of their lien as attorneys, and costs to be paid by the executor personally, *held*, that a demand for the entire amount of the petitioners' lien upon the entire decree did not afford a basis for a proceeding to punish him for contempt. *Matter of Feehan*, 36 Misc. 614, 73 Supp. 1126.

Subd. 12. Contempts in Justice's Court. Code Civil Procedure, §§ 2870, 3001, 3002, 3003.

While no attempt is made to give the practice in justices' court, the provisions of the Code relative to contempts, civil and criminal, in that court are cited for convenience of reference in connection with the general subject of contempts.

§ 2870. Criminal contempts.

A justice of the peace has power to punish, for a criminal contempt, a person guilty of either of the following acts:

1. Disorderly, contemptuous, or insolent behavior toward him, while engaged in the trial of an action, the rendering of a judgment, or any other judicial proceeding; where such behavior directly tends to interrupt proceedings, or to impair the respect due to his authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt his official proceedings.

3. Resistance willfully offered, in his presence, to the execution of his lawful mandate.

He has not power to punish, for a criminal contempt, in any other case.

§ 3001. Witness refusing to be sworn, etc. Warrant thereupon.

Where a witness, attending before a justice in an action, refuses to be sworn or affirmed in the form prescribed by law; or to answer a pertinent and proper question; or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce, as prescribed in section 2969 of this act, or duly required to produce by an order, made as prescribed in section 867 of this act; and the party, at whose instance he attended, makes oath that the testimony of the witness, or that the book or paper is so far material that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county.

§ 3002. Contents of warrant; imprisonment of recusant witness.

The warrant must specify the cause for which it is issued. If it is issued for refusing to answer a question, the question must be specified therein; if for neglecting or refusing to produce a book or paper, the same must be described with convenient certainty. The recusant witness must be closely confined, by virtue of the warrant, until he submits to be sworn or affirmed, or to answer, or to produce the book or paper required, as the case may be; or is otherwise discharged according to law.

§ 3003. Adjournment thereupon.

The justice must thereupon, from time to time, at the request of the party in whose behalf the witness attended, adjourn the trial, until the witness testifies, or produces the book or paper required, or dies, or becomes a lunatic, or is discharged according to law.

A justice of the peace has power, under section 2870 of the Code, to punish a contempt committed upon the trial of a criminal case at which he is presiding. *People ex rel. Deal v. Williams*, 51 App. Div. 102, 64 Supp. 457.

The justice of the New York City Court who has granted an order in supplementary proceedings, or one before whom it has been properly continued, in accordance with the Code of Civil Procedure, sections 26 and 2462, has full power and authority by statute to punish for contempt a disobedience of such order; and orderly practice requires that recourse should be had to the justices of that court rather than to the Supreme Court when violation of their orders is charged. *Matter of Buchsbaum v. Lane*, 63 Misc. 374, 108 Supp. 419.

Subd. 13. Miscellaneous Decisions as to What Constitutes a Contempt. Code Civil Procedure, § 3247.

§ 3247. Costs in case of transfer, etc., of cause of action.

Where an action is brought, in the name of another, by some other person beneficially interested therein, or the cause of action becomes the property of a person, not a party to the action, the transferee or other person so interested is liable for costs to the same extent if he were plain-

tiff; except in a case where he could not have been lawfully directed to pay costs, if he had been a party, the disobedience to the order is a contempt of court.

In administering the law in respect to the violation of injunctions, the Court of Chancery never lost sight of the principle that it was the disobedience to the order of the court which constituted the contempt, and, therefore, although it required of the party availing himself of its order a substantial compliance with the rules of practice upon the subject, it would not usually allow the effect of its orders to be wholly lost, when the party sought to be bound by the order had actual knowledge, or notice of its existence, although there might have occurred some slip in the formal method of bringing it home to him. *People v. Sturtevant*, 9 N. Y. 263 (278).

To constitute a constructive contempt of court some act must be done not in the presence of the court or judge that tends to obstruct the administration of justice or bring the court or judge or the administration of justice into disrespect, and the proof must show beyond reasonable doubt that the defendant willfully refused to do what the court directed. *Saal v. S. Brooklyn Ry. Co.*, 122 App. Div. 364, 106 Supp. 996.

Among the acts adjudged to be contempts are the taking of property from an officer when seized on mesne, but not on final process. *People v. Church*, 2 Wend. 262. Breaking open parts of books sealed up and delivered to a party for inspection. *Dias v. Merle*, 2 Paige, 494. Writing an insulting letter to a grand jury. *Bergh's Case*, 16 Abb. 266. Interfering with property in the possession of a receiver. *Riggs v. Whitney*, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See on this point, also, *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Baker v. Browning*, 8 Paige, 388; *Hilliker v. Hawthorne*, 5 Bosw. 710; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565. Procuring an insolvent person to justify as bail. *Hall v. L'Platimer*, 49 How. 500. Bringing a suit against a lunatic or habitual drunkard after notice of injunction, or against a receiver. *L'Amoureux v. Crosby*, 2 Paige, 422; *Riggs v. Whitney*, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See *People ex rel. Borst v. Grant*, 41 Hun, 351.

In general, if a party stipulates in open court to pay the expenses of a reference, and he is ordered to pay and refuses, giving no satisfactory reason, he may be punished for contempt. *Fischer v. Raab*, 56 How. 218; aff'd, 58 How. 221; *People v. Reilly*, 56 How. 223. Bringing an action in the name of another person, without his privity or consent, is a contempt. *Butterworth v. Stagg*, 2 Johns. Cas. 291.

A writ of certiorari, though made returnable at a Special Term in the wrong judicial district, may be the basis for a proceeding against the commissioners of taxes and assessments for contempt in failing to make a return thereto, since the writ is not void, and cannot be attacked collaterally.

People ex rel. Long Island R. R. Co. v. Feitner, 53 App. Div. 181, 65 Supp. 935.

An attorney advising his client to file a petition in bankruptcy pending supplementary proceedings is not guilty of contempt. *Matter of Kepecs*, 123 Supp. 872.

A sheriff is liable to attachment for not returning process. *People v. Brown*, 6 Cow. 41. Or for an insufficient return, with intent to favor defendant. *Burk v. Campbell*, 15 Johns. 456.

It seems that a sheriff who refuses to receive a warrant of attachment delivered to him on a Saturday afternoon, and promises, but fails, to go himself or send a deputy to see one of the plaintiffs' attorneys later in the day, is guilty of contempt. *Dailey v. Fenton*, 47 App. Div. 418, 62 Supp. 337.

The order requiring an officer of the court to pay moneys in his hands, as such officer, into court, need not be accompanied by a special commitment, but failure to comply with the order is a contempt. *Whitman v. Haines*, 21 St. Rep. 41, 4 Supp. 48.

Willful disregard by a board of aldermen, of a writ of mandamus, is punishable by fine and imprisonment of the members. *People ex rel. Pierce v. Cassidy*, 28 Misc. 589, 59 Supp. 1112; aff'd, 44 App. Div. 399, 60 Supp. 703.

Failure to repay into court money paid to defendant under a judgment, when so ordered upon a reversal of the judgment, is a contempt which may be enforced by a commitment.

The court has power, however, to relieve defendant from the order, in a proper case, where there is inability to make restitution. *Devlin v. Hinman*, 40 App. Div. 101, 57 Supp. 663, 29 Civ. Pro. 127; aff'd, 161 N. Y. 115.

A party to an action is punishable as for a contempt by commitment or by striking out her answer, or by both, for failure to comply with an order of restitution directing her to restore, by payment to the county treasurer, money obtained by her from the depository of the court, under and by virtue of a judgment rendered in her favor and thereafter reversed on appeal. *Devlin v. Hinman*, 161 N. Y. 115, aff'g 40 App. Div. 101, 57 Supp. 663.

The wife of a judgment debtor replevied and removed from the jurisdiction goods which had been levied upon under the execution, giving an undertaking, a surety on which swore falsely as to the value of his property. *Held*, that he was guilty of contempt; and the court was warranted in imposing upon him a fine equal to the amount of the judgment.

It is not a prerequisite to the punishment of a party for contempt that the party to the action in whose interest the contempt proceeding is in-

stituted shall have exhausted all other remedies for making good the damages. *Matter of Goslin*, 95 App. Div. 407, 88 Supp. 670.

Failure of an assignee for creditors to produce a ledger of the assignor, placed by direction of the latter in another than its usual place, and being a book the assignee had no occasion to use, *held*, not sufficient to justify his punishment as for a contempt. *Matter of Wegman's Sons*, 40 App. Div. 632, 57 Supp. 987.

An officer of a corporation who has been directed to produce a large number of books and records of the corporation on his examination as a witness before trial is not guilty of contempt in merely failing to have all the books and papers before the referee on the day fixed for his attendance; but where he refuses to produce certain of said books subsequently on demand when their use in aid of his examination has become necessary, he may be punished for contempt, and advice of counsel furnishes no excuse, but only affects the penalty. *Press Pub. Co. v. Associated Press*, 27 Misc. 90, 58 Supp. 186, 29 Civ. Pro. R. 203; *modified*, 41 App. Div. 493, 58 Supp. 708.

It seems that a receiver of rents and profits appointed pending a suit of foreclosure cannot resort to contempt proceedings to compel a tenant to pay rent as required by an order, but should resort to the remedies available, to the landlord whom he represents. Contempt proceedings are available, however, where a person claiming to be lessee of the entire premises collects rents from a subtenant in defiance of an order forbidding him to do so, for in such case he interferes with the possession of the court through its receiver. *Guerrier v. Coleman*, 135 App. Div. 46, 119 Supp. 875.

Perjury has always been held to be a great contempt of court, and the court has power to punish sureties for that offense, by imposing upon them a fine sufficient to indemnify the defendant for the loss and injury he has sustained through their misconduct, and by imprisoning them for six months and until the fine is paid.

Courts of justice have had the power of punishing contempt by summary proceedings from time immemorial. This power is a branch of the common law which has been adopted and sanctioned by the Constitution of this State, and, therefore, a proceeding to punish for contempt is not one of the cases in which article 1, section 2, of the Constitution gives the right to a trial by jury.

A summary proceeding to punish for contempt is a due process of law, and was recognized as such when the Constitution of the United States was adopted, and is not within the prohibition of that section of it which provides that "no person shall be deprived of life, liberty or property without due process of law." *Eagan v. Lynch*, 3 Civ. Pro. 236.

A motion to punish a defendant for contempt in failing to comply with a decree requiring him to remove obstructions from lands leased from the

plaintiff should not be denied merely because the defendant has not the financial ability to comply.

The decree is binding, and cannot be questioned except it be changed or modified on an appeal, or by an application in a proper action or proceeding.

It seems that the question of the defendant's ability to comply with the order may be determined upon his motion to be discharged from imprisonment under section 775 of the Judiciary Law. *Schmohl v. Phillips*, 138 App. Div. 279, 122 Supp. 974.

Subd. 14. Defenses and Excuses for Contempt.

In determining whether parties are guilty of misconduct in failing to obey a lawful mandate of the court, no inquiry into its merits will be allowed. *Koehler v. Farmers & Drovers' Bank*, 14 Civ. Pro. 71. An order, though erroneous, is entitled to obedience. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305, citing *People v. Sturtevant*, 9 N. Y. 263.

Disobedience to a lawful order of a court or judge is a contempt, and an order is binding until reversed, unless void for want of jurisdiction; but if erroneous only, that fact will be considered in mitigation of the punishment. *Hilton v. Paterson*, 18 Abb. 245; *People v. Bergen*, 53 N. Y. 404; *Moat v. Halbein*, 2 Edw. Ch. 188; *People v. Sturtevant*, 9 N. Y. 263; *Sullivan v. Judah*, 4 Paige, 442; *Perry v. Mitchell*, 5 Denio, 537; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *Higbie v. Edgerton*, 3 Paige, 253; *People v. Spaulding*, 2 Paige, 326; *Smith v. Reno*, 6 How. 124.

If a judgment is erroneous the remedy is to move to modify. *Park v. Park*, 80 N. Y. 156. That an injunction is too broad, and partially beyond the jurisdiction of the court, is no excuse as to those matters as to which the court has jurisdiction. *Atlantic & Pacific Tel. Co. v. B. & O. R. R. Co.*, 46 Super. Ct. 377; modif'd, 87 N. Y. 355. But violation of a void injunction order is not a contempt. *People v. Edson*, 52 Super. Ct. 53. Nor is it an excuse that the order is broader than the prayer of the complaint. *Mayor v. N. Y. & S. R. R. Co.*, 64 622, aff'g 40 Super. Ct. 301. Or that the referee before whom a debtor was to be examined was hostile to him. *Tremain v. Richardson*, 68 N. Y. 617. Or after examination that the affidavit on which the proceedings were based was informal. *Lehmaier v. Griswold*, 46 Super. Ct. 11. An appeal from the order, without a stay, does not justify its violation. *Stone v. Carlan*, 2 Sandf. 738; *People v. Bergen*, 53 N. Y. 404; *Leland v. Smith*, 11 Abb. N. S. 231; *Troy & B. R. R. Co. v. B. & H. R. R. Co.*, 57 How. 181. The direction of a third person will not protect a party from punishment, though it may bear on the extent of the punishment, as will the advice of counsel. *Krom v. Hogan*, 4 How. 225; *Matter of Fitton*, 16 How. 303; *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; *Haw-*

ley v. Bennett, 4 Paige, 163; *Rogers v. Patterson*, 4 Paige, 450; *Billings v. Carver*, 54 Barb. 40; *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 512; *Taggard v. Talcott*, 2 Edw. Ch. 628; *Hilliger v. Hathorn*, 5 Bosw. 710. The submission to an examination by a debtor, after violation, is a mitigation of punishment. *Hilton v. Patterson*, 18 Abb. 245.

The advice of his attorney that the injunction is illegal will not justify or excuse the party enjoined in violating the injunction. *Capet v. Parker*, 3 Sandf. 662. In *Hawley v. Bennett*, 4 Paige, 164, it was said that so far as the rights of the party have been affected by the breach of the injunction, it is no defense to the person who has been guilty of violating, that he did so under the advice of counsel, although, if he has acted in good faith, it may be sufficient to protect him from punishment, as for a criminal contempt. The rights of parties must be protected against the wrongful acts of the adverse party, although he may have acted under the advice of counsel. But where a party acted under the mistaken advice of counsel that an injunction was superseded by an appeal taken therefrom, the fine imposed should not exceed the actual damages sustained by the adverse party. *Power v. Village of Athens*, 19 Hun, 165. Yet while the fact that a person acted under the erroneous advice of counsel may palliate the offense so as to protect him from further punishment, it will not protect from a fine sufficient to compensate the adverse party. *Lansing v. Easton*, 7 Paige, 364; *Billings v. Carver*, 54 Barb. 40.

An order putting a party in contempt was modified upon its appearing that he acted under the advice of counsel. In *People ex rel. Del Mar v. St. Louis Ry. Co.*, 19 Abb. N. C. 1, a like rule was held, the respondents having acted from a mistaken knowledge of duty and other legal advice, and having subsequently fully complied with the order.

A person will not be punished as for a contempt for failure to do an act which he cannot do. Thus a corporation which has been adjudged guilty of contempt because of the failure of its president to appear for examination will not be punished where it is shown that before the order for examination was made the person named therein as president had in good faith disposed of his stock, ceased to be either president or director, and severed all connection with the corporation so that it had no control or jurisdiction over him. Under such circumstances the imposition of a penalty would be unjust. *Grant v. Greene Consol. Copper Co.*, 125 App. Div. 833, 110 Supp. 253.

The order adjudging a receiver in contempt for non-payment of money was held to be erroneous, where it was uncertain as to whether he was entitled to be allowed for alleged expenditures, and as to whether he had received the full amount specified, and where the order failed to state that damages to the estate of that amount had been caused by the non-payment. *Weston v. Watts*, 15 St. Rep. 123.

Affidavits showing that defendant, in contempt for failure to pay alimony, is unable to do so, are unavailing in opposition to a motion to punish him for contempt, though available on a motion in his own behalf to release him from imprisonment. *Young v. Young*, 35 Misc. 335, 71 Supp. 944.

It is not a valid objection to an order adjudging the witness to be guilty of contempt in refusing to produce books before a referee that the order was made by the court and not by a judge, where it appears that the order was not issued *ex parte*, but after a hearing, of which the witness had notice, and after which he was given opportunity to comply with the direction of the court. *Press Pub. Co. v. Associated Press*, 41 App. Div. 493, 58 Supp. 708.

Repayment of funds received by a party to an action for a partnership accounting from a receiver therein cannot, upon reversal of the judgment under which it was paid, be recovered back by proceedings for contempt. *Schulte v. Anderson*, 48 Super. Ct. 133. An assignee for the benefit of creditors cannot, like a receiver, be punished for contempt for not complying with an order to pay out moneys in his hands. *Matter of Radtke*, 16 Wkly. Dig. 28. An order should not be granted for the arrest and imprisonment of a party who had obtained an attachment against property for his failure to pay the sheriff's charges, as fixed by an order vacating the attachment. *Hall v. U. S. Reflector Co.*, 66 How. 31. See *Myers v. Becker*, 95 N. Y. 486. A final decree on an accounting by a general assignee cannot be enforced by proceedings for contempt. *Matter of Stockbridge*, 7 Abb. N. C. 395.

Unless the order directs surrender of premises, as well as a conveyance, a party cannot be punished for refusing to deliver possession. *Tinkev v. Langdon*, 60 How. 180; *McKelsey v. Lewis*, 3 Abb. N. C. 61. A person sued by a wrong name will not be punished for contempt for failing to obey an order if he has not appeared in the action. *Muldoon v. Pierz*, 1 Abb. N. C. 309. It is not a contempt to fail to pay costs in an action between husband and wife, as costs are collectible by execution. *Noland v. Noland*, 29 Hun, 630; *Jacquin v. Jacquin*, 36 Hun, 378.

It is doubtful whether the court has power to punish a person for abuse of its process in preferring unfounded charges of professional malfeasance against an attorney for the purpose of procuring his disbarment. *Matter of Dunn*, 27 App. Div. 371, 50 Supp. 163, 84 St. Rep. 163.

It has been intimated that the process will not ordinarily issue to collect money where there is a fund in hand out of which payment ought to be made. *Matter of Watson v. Nelson*, 69 N. Y. 536. And it is held proper only in cases where the moneys cannot be collected by execution. *Baker v. Baker*, 23 Hun, 56; *People v. Riley*, 25 Hun, 587; *O'Gara v. Kearney*, 77 N. Y. 423. Where the failure to pay is from inability, see *Cochran v. Ingersol*, 13 Hun, 368. But where a party is unable to pay over the

moneys by reason of his own fault it is no defense. *Lansing v. Lansing*, 41 How. 248.

The incumbent of the office of warden of the city prison of New York was removed by the commissioner of correction, who appointed a successor, who exercised the duties of the office until the court upon certiorari made a final order adjudging that the removal was wrongful, and directing the commissioner to restore the person removed to his office. The commissioner made an order stating that two wardens were necessary and continued his new appointee to serve as warden during the day and designated the reinstated warden to serve only at night. *Held*, that the commissioner's decision that a second warden was necessary was a shallow pretext for disobeying the order of the court, and that he was guilty of contempt. *People ex rel. Fallon v. Wright*, 22 App. Div. 165, 47 Supp. 894, 81 St. Rep. 894. Where the return to a writ of habeas corpus, procured by a husband for the purpose of obtaining from his wife the custody of their infant child, alleges that the child is living in New Jersey and is not a resident of New York, and no traverse is interposed to such allegation, the mother of the child cannot be adjudged guilty of contempt for a failure to produce the child as demanded in the writ. *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 Supp. 814, 86 St. Rep. 814. A surety who, by false justification, secures the release of a mechanic's lien is guilty of a contempt of court, and lapse of time is not a defense. *Matter of Hay Foundry & Iron Works*, 22 App. Div. 87, 47 Supp. 802, 81 St. Rep. 802. After the entry of judgment in a judgment creditor's action adjudging that a transfer by the judgment debtor of his business, consisting of books of account and merchandise, to his sister, was fraudulent and void as to his creditors, and requiring him and his sister to account for the property so transferred, the judgment debtor attended before the referee designated in the judgment, and swore that the books of the business as carried on by his sister were in the possession of third persons to whom she had sold. *Held*, that the judgment debtor could not be committed for contempt because of an alleged failure to account, as he had rendered as full an account as he possibly could. *Diffany v. Risley*, 23 App. Div. 371, 48 Supp. 283, 82 St. Rep. 283. A resale without leave of court by a vendor of goods which a receiver has refused to receive under a contract is not a contempt of the injunction order. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271. Where the commissioner of bridges of New York city violates, under advice of counsel, an injunction order prohibiting him from interfering with or obstructing plaintiff in laying down his pneumatic tubes over the bridge, he is liable to punishment as for a contempt, but where the act was done in good faith and with no willful intent to violate the order, the commissioner and his adviser should not be punished by way of fine for their act. *N. Y. Mail & Trans. Co. v. Shea*, 30 App. Div. 374, 52 Supp. 5, 86 St. Rep. 5.

It is no answer to the proceedings for contempt that the pecuniary circumstances of the defendant are such that he is unable to comply with the order. *Lansing v. Lansing*, 41 How. 248.

An injunction restraining a party from suing executors is not violated by suing heirs-at-law. *Dale v. Rosevelt*, 1 Paige, 35. After service of an ordinary injunction in a creditor's suit, defendant is not guilty of contempt in proceeding to judgment in a suit already commenced. *Parker v. Wakeman*, 10 Paige, 485.

A sheriff who has acted in good faith should not be punished as for contempt for a mistake of law. *Second National Bank of Oswego v. Dunn*, 63 How. 434. The interposition of a verified answer by a defendant, knowing it to be false is not a contempt. *Moffat v. Herman*, 17 Abb. N. C. 107, rev'g 17 Abb. N. C. 62. See *People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245, for discussion as to contempt in view of court. An answer may be stricken out for refusal to obey an order of the court. *Clark v. Clark*, 1 St. Rep. 287; *Clark v. Clark*, 11 Civ. Pro. 7.

A third party will not be punished for refusing to comply with an order that he turn over property of the judgment debtor in his hands to the receiver; the receiver must bring suit. *West Side Bank v. Pugsley*, 12 Abb. Pr. N. S. 28; s. c., 47 N. Y. 368.

A mere statement by the officers of a corporation that they are not now possessed of the books, which they were ordered to produce upon an examination before trial, will not exonerate them from obedience to the order, where it appears that the books were lately in their control. *Fenlon v. Dempsey*, 21 Abb. N. C. 291. In proceedings to punish for contempt in refusing to obey a judgment that required defendant, as president of a company, to do certain acts, it was held no excuse for his non-compliance that the co-operation of other officers was necessary. *King v. Post*, 12 St. Rep. 575. Under section 2284 a witness may be punished by the imposition of a fine within the limit prescribed by that statute, for failure to attend as a witness in obedience to a subpoena, although no actual loss or injury has been occasioned to the party in whose behalf the subpoena was served. *People ex rel. Duffus v. Brown*, 46 Hun, 320. A person against whom two proceedings for contempt have been executed cannot be said to be twice punished for the same offense, where the performance of the act required will relieve him from imprisonment in both proceedings and the imposition of an excessive fine will not entitle him to relief from imprisonment on habeas corpus. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305.

Irregularities cannot be invoked as a defense in a contempt proceeding, especially where the decree disobeyed was entered by the consent of the defendant, who subsequently absconded from the jurisdiction of the court. *Moore v. Moore*, 142 App. Div. 459.

ARTICLE VI.

PROCEEDING, HOW COMMENCED AND CARRIED ON. Judiciary Law, §§ 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 771, 781.

Subd. 1. Order to show cause and warrant defined, and when they may issue, 746.

§ 757. *Order to show cause or warrant to attach offender, 746.*

§ 760. *When order to show cause may be made, 746.*

§ 761. *Order to show cause defined, 746.*

§ 762. *Warrant of attachment defined, 746.*

§ 781. *Punishment for misconduct at Trial Term, 747.*

Subd. 2. Service of order to show cause, 750.

§ 763. *Copy of affidavit and warrant must be served on accused, 750.*

Subd. 3. Procedure when offense committed before referee, 753.

§ 759. *Order to show cause or issue of warrant when contempt committed before referee, 753.*

Subd. 4. Procedure upon notice to delinquent officer pursuant to statute, 754.

§ 758. *Notice to delinquent officer to show cause, 754.*

Subd. 5. Undertakings and proceedings to obtain discharge, 754.

§ 764. *Amount of undertaking may be indorsed on warrant, 754.*

§ 765. *Execution of warrant when undertaking not given, 754.*

§ 766. *Undertaking to procure discharge, 755.*

§ 767. *When habeas corpus may issue, 755.*

§ 768. *Sheriff to file undertaking with return, 755.*

§ 771. *Punishment upon return of habeas corpus, 755.*

Subd. 1. Order to Show Cause and Warrant Defined, and When They may Issue. Judiciary Law, §§ 757, 760, 761, 762, 781.

§ 757. *Order to show cause, or warrant to attach offender.*

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard. (Code Civ. Pro., §§ 2269, 2271.)

§ 760. *When order to show cause may be made.*

An order to show cause may be made, either before or after the final judgment in the action, or the final order in the special proceeding. (Code Civ. Pro., § 2273.)

§ 761. *Order to show cause defined.*

An order to show cause is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein. (Code Civ. Pro., § 2273.)

§ 762. *Warrant of attachment defined.*

A warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant. (Code Civ. Pro., § 2273.)

§ 781. Punishment of misconduct at trial term.

Where a misconduct, which is punishable by fine or imprisonment, as prescribed in this article, occurs at a trial term, or with respect to a mandate returnable at such term, and was not punished at the term at which it occurred, the supreme court may inquire into and punish the misconduct, as if it had occurred at a special term of the supreme court, held in the same county, or with respect to a mandate returnable at such a special term. (Code Civ. Pro., § 2292.)

The proceedings to punish for contempt must be taken as prescribed by statute. They are *stricti juris*. The statute requires that there shall be served upon the accused before he is punished for contempt either an order to show cause why said punishment should not be inflicted or that there should issue a warrant of attachment to bring him before the court. But whatever mode is adopted it is necessary that certain facts shall be made to appear to the court. These facts are specified in section 2269, and one is that the judge must be satisfied by affidavit of the commission of the offense. Until this has been done no order to show cause can be issued. *Bradbury v. Bliss*, 23 App. Div. 606.

Much conflict is found in the decisions previous to the Code of Civil Procedure, as to whether the proceedings should be entitled, as in the action or proceedings in which the contempt originated, or as a new special proceeding. This question is definitely settled by section 2273 (Judiciary Law, §§ 760, 762), which provides that a warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused in behalf of the people, upon the relation of the complainant. In following the precedents hereafter in entitling papers, this distinction must be carefully borne in mind, and the title must be adapted as to the original action or a new proceeding, as it may be commenced by warrant or order, up to the time of the issuing of the warrant. It then becomes a special proceeding, and must be so entitled, however commenced. *Matter of Dissosway*, 91 N. Y. 235. It, however, leaves open the question as to how the order should be entitled which directs the warrant to issue. It would seem proper to entitle the papers up to the warrant in the original suit and proceeding. See *Folger v. Hoogland*, 5 Johns. 235; also *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; and *Sudlow v. Knox*, 7 Abb. Pr. N. S. 411.

It is said in *Whitman v. Haines*, 21 St. Rep. 41, by Brady, J., at p. 43, that in procedure by order to show cause, the caption of the action is properly preserved, that it is only where the proceeding is by attachment that the contrary is true.

Where the defendant fails to object to the examination of witnesses before the court, but on the contrary cross-examines them, he must be held to have consented to the practice adopted, and cannot complain thereof on appeal. *King v. Barnes*, 113 N. Y. 476, 23 St. Rep. 263, aff'g 51 Hun, 557, 22 St. Rep. 54, 4 Supp. 251.

Where, in contempt proceedings, the order to show cause and the moving papers present the matter to the court in such a way as to leave it open for it to decide as to the guilt of defendants, the nature of the offense, and the measure of their punishment, the court may find them guilty of, and punish them for, a civil contempt, though the notice served with the moving papers states that relators will ask for the penalty prescribed by section 9 for a criminal contempt. *People v. Rice*, 144 N. Y. 250.

While one is already in jail for a contempt in omitting to pay the sum due for alimony, and has no property which can be reached, and is unable to give security, a second order of a similar character will not be granted. *Mendel v. Mendel*, 6 St. Rep. 511.

There are two methods of procedure against a party for contempt. The court shall either grant an order that the accused party show cause at some reasonable time therein specified why he should not be punished for the alleged misconduct, or issue an attachment to arrest such party and to bring him before the court. *Goldie v. Goldie*, 77 App. Div. 12 (15), 79 Supp. 268.

An order to show cause is not a short notice of motion or substitute for a notice of motion, deniable without prejudice, but a necessary preliminary under section 2269. *People ex rel. Platt v. Rice*, 26 Supp. 345.

The fact that the judgment creditor asked for an order to show cause, under section 2269, does not compel the court upon the return thereof, if there should be a default in appearance, to issue a commitment; subdivisions 1 and 2 of section 2269 merely provide two different methods of summoning the delinquent before the court to answer for the alleged offense. *Sonn v. Kenny*, 63 Misc. 251, 116 Supp. 613.

An order to show cause why a party to a special proceeding should not be punished for contempt for disobedience of an order made in such proceeding does not institute a new proceeding but is an order in such special proceeding, and it is properly served upon the attorneys therein of the party proceeded against. *State Bk. v. Wilchinsky*, 64 Misc. 476, 118 Supp. 578.

An order to show cause why a party should not be punished for a contempt of court cannot be made until the contempt has been committed. *Bradbury v. Bliss*, 23 App. Div. 606, 48 Supp. 912.

There must be an affidavit in civil cases; the statute is express. *Ackroyd v. Ackroyd*, 3 Daly, 38. The party is brought into court by attachment either absolute or *nisi*. *Jackson v. Smith*, 5 Johns. 117; *Matter of Smethurst*, 2 Sandf. 724; *Matter of Vanderbilt*, 4 Johns. Ch. 57. The proceeding may be by attachment for contempt, or order to show cause why the party should not be punished for contempt. In either case it must be shown that the party is in contempt, and where the proceeding is by order to show cause the papers on which the application is founded, or so much

of them as are not already in possession of the accused, must be served on him or his solicitor such length of time before the hearing as the order directs. The service of a mere notice of motion is not sufficient; the party must be brought into court by the service of an order to show cause or an attachment. *Sandford v. Sandford*, 40 Hun, 540. Either an attachment must issue or an order be granted to show cause why the party should not be punished for misconduct, otherwise the proceedings are invalid. *Fall Brook Co. v. Heckscher*, 6 St. Rep. 676. If a party fails to appear, or show no sufficient cause, the court may make a final order of punishment for contempt. If the contempt is denied the court may discharge the order to show cause or require interrogatories on the coming in of which the court acts. So where the procedure is by attachment, there must be interrogatories, unless the accused admit the contempt as charged. *Albany City Bank v. Schemerhorn*, 9 Paige, 372. It was held, in *Dunford v. Weaver*, 84 N. Y. 445, that the process need not recite all the facts and proceedings necessary to confer jurisdiction; and in *Park v. Park*, 80 N. Y. 156, it was held that where there was an indorsement on the process signed by the clerk, showing it was issued by special order of the court, it would be presumed an order had been entered, but in any event, as the objection was not raised below, it could not be raised in Court of Appeals.

The discretion of a judge in fixing time within which an attachment is returnable is in the discretion of the court, but reviewable at General Term. The attachment should be returnable before the judge by whom it is granted. But error is amendable, and is waived by giving a bond to the sheriff, at least so far as the validity of the bond is concerned. *Kelly v. McCormick*, 28 N. Y. 318; *Power v. Village of Athens*, 19 Hun, 169.

Where the order was made requiring the defendant to appear at a certain time and place specified, to show cause why he should not be attached for a contempt, on the return of which an order was made adjudging him guilty of a contempt, and directing his punishment therefor, and it did not appear that he was misled or failed to appear in consequence of the use of the term attached in place of punished, it was *held*, that as the use of the term did not appear to have prejudiced the defendant, the order should be affirmed. *People v. Kenny*, 2 Hun, 346.

Where the proceeding is commenced by notice of motion, instead of an order to show cause, or by an attachment, the irregularity is cured by appearing and answering without objection. An attachment has been granted in the first instance where an evasive return was made to writ of habeas corpus. *Matter of Stacy*, 10 Johns. 328. The order to show cause should not be an adjudication that the defendant is guilty of the contempt, but only an order to bring him into court. *McCredie v. Senior*, 4 Paige, 378.

An order to show cause to punish for a contempt, made by a county judge, returnable after expiration of his term of office, may be heard and decided by his successor in office. *Ganeman v. Berry*, 34 Hun, 138.

Where parties, in response to an order to show cause why they should not be punished for contempt, appeared and answered, they thereby waived any defects in the affidavit upon which the order was issued. *People ex rel. v. Court of Sessions*, 147 N. Y. 290.

Subd. 2. Service of Order to Show Cause. Judiciary Law, § 763.

§ 763. Copy of affidavit and warrant must be served on accused.

A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof. (Code Civ. Pro., § 2274.)

Copies of the affidavits upon which the papers are granted should be served. *Matter of Smethurst*, 2 Sandf. 724; *Ward v. Arenson*, 10 Bosw. 589. It is sufficient if a party charged with contempt has reasonable notice of an application to punish him, and was served with copies of the affidavits on which it was based. Papers once served and referred to in the order to show cause need not be again served. *Clark v. Binninger*, 43 Super. Ct. 126; *aff'd*, 75 N. Y. 344.

Where an order that an administratrix show cause was addressed to her individually and not as administratrix, but the copy of the decree had been served and was referred to in the order, it was held the error might be amended. *Gillies v. Kreuder*, 1 Dem. 349. In a proceeding to punish for contempt, against agents of a city, it was objected that it did not appear that the summons and complaint in the original action had been served on the city, and the court allowed proof of such service to be made *nunc pro tunc*. The attachment was issued upon an affidavit also that the action was commenced by the service of a summons and complaint on the city. *Held*, that the original papers sufficiently showed that the city was a party to the action, and the order as to filing proof merely supplied additional proof of the fact. *People v. Dwyer*, 90 N. Y. 402.

Where an order has been made requiring a husband to pay alimony theretofore ordered, and directing that if he fails to do so a commitment issue against him as for contempt, it is not required that there be served with the final order the affidavit or proof recited therein and notice for an application for such order be given. Section 2274 (Judiciary Law, § 763), requiring affidavit and proof upon which the order to punish for contempt shall be served, refers to affidavit upon which a warrant of attachment is granted to bring a party before the court to answer for an alleged contempt. Such notice of application may be dispensed with where the contempt consisted of neglect or refusal to pay a specified sum of money as required by an order of the court. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 184.

An order to show cause in a contempt proceeding is equivalent to a notice of motion in the action, and the subsequent proceedings are taken as upon a motion in an action; and a second order fixing a new date for an examination before trial need not be personally served upon the party but may be served upon his attorney, where the original order was served upon him personally. *Grant v. Greene*, 121 App. Div. 756, 106 Supp. 532.

The fact that the attachment was directed to the sheriff of a county named therein, and generally to the sheriff of any county, does not invalidate the writ or proceedings had thereunder, as the particular direction may be rejected as mere surplusage. *People ex rel. Duffus v. Brown*, 46 Hun, 320.

To authorize punishment of a party for contempt in disobeying an order, such order must have been served upon him personally. *Matter of Siebert*, 30 Misc. 680, 62 Supp. 513.

An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient. *Matter of Weeks v. Coe*, 111 App. Div. 337, 97 Supp. 704.

An error in a copy of an order to show cause in contempt proceedings in respect to the time prescribed for its service or in omitting to state the acts constituting the alleged contempt is waived by the general appearance of the persons against whom the proceeding is taken.

Such an order need not be made returnable in less than eight days. *Matter of Becker v. Gerlich*, 72 Misc. 157.

The judgment having been rendered against a defendant sued in his trade name resembling that of a corporation, personal service on defendant is requisite to establish contempt in not obeying an order issued in supplementary proceedings. *Keystone Pub. Co. v. Hill Dryer Co.*, 55 Misc. 625, 105 Supp. 894.

An order from a justice of the Supreme Court, made at chambers, requiring defendant to appear at Special Term, and show cause why an attachment should not be issued against him, and he be punished for an alleged contempt and misconduct, is well served upon defendant's attorney, when so directed to be served, and defendant is bound thereby.

In an order to show cause, personal service of the order, together with the affidavits upon which it is grounded, upon the defendant, is not necessary. *Pitt v. Dawson*, 37 N. Y. 235.

An order requiring the husband to show cause why he should not be punished for his failure to make a payment of alimony may be served upon his attorney, where it does not appear that final judgment has been entered. *Zimmerman v. Zimmerman*, 26 Abb. N. C. 366 (367), 14 Supp. 444.

The court cannot adjudge a defendant guilty of contempt unless it has acquired jurisdiction over his person; such jurisdiction is not acquired by the service of an order to show cause upon the defendant's attorney, who had represented him in a divorce action. *Keller v. Keller*, 100 App. Div. 325, 91 Supp. 528.

Where an attachment in contempt proceedings has been personally served upon the party proceeded against, notice of the subsequent proceedings may be given to his attorney in all cases where the personal presence of the party is not required. *Watrous v. Kearney*, 11 Hun, 584; *dism'd*, 79 N. Y. 496.

Where attorneys appeared for the person adjudged guilty of contempt, after service on him of an attachment, he was held bound by their appearance and action. *Watrous v. Kearney*, 79 N. Y. 496.

Service of the order to show cause why a judgment debtor should not be adjudged in contempt, upon her attorney of record, who appears on the return day and files an affidavit in opposition, is sufficient to give the court jurisdiction. *Isaacs v. Calder*, 42 App. Div. 152, 59 Supp. 21.

An order to show cause in proceedings to punish for a contempt of court may be served on the attorney for the defendant charged with the offense.

An attorney authorized to act for the defendant in an appeal from an interlocutory judgment and who has been his attorney in the action is the defendant's attorney for all the purposes of the action. *Lederer v. Lederer*, 47 Misc. 471, 93 Supp. 934.

Although a party may not be punished for contempt for failure to obey an order not personally served upon him, yet when an original order for examination before trial has been personally served upon a party and the time set for examination has expired by reason of his application for a stay of proceedings, a subsequent order fixing a new date for the examination need not be personally served but may be served upon his attorney, and an order adjudging the party guilty of contempt for failing to appear for examination at the new date may be entered, although the moving papers do not show personal service of the order fixing that date.

Where the order which has been disobeyed has been duly personally served upon a party to an action, any subsequent order in the action to continue the effect thereof or to punish the party for violating the same may be served upon his attorney, section 802 of the Code of Civil Procedure notwithstanding. *Grant v. Greene*, 121 App. Div. 756, 106 Supp. 532.

Where an order directed an attachment to issue to bring the defendant before the court to answer for his alleged disobedience of an order requiring him to appear and be examined before trial, and the papers showed that upon the return day of the order, the defendant appeared and moved to have the application dismissed, and the court held the motion under advisement until a later day, when it denied the application to dismiss, and

made an order requiring the defendant to appear two days later for examination, which order was not served upon the defendant, but upon the defendant's attorney; it was held that in the absence of proof showing a service of the order upon the defendant personally, he could not be adjudged guilty of a contempt for failing to comply with it. *McCauley v. Palmer*, 40 Hun, 38.

In order to punish for contempt through failure to appear pursuant to an order for examination before trial, payment or tender of witness fees must be shown. *Kaplan v. Sher*, 114 Supp. 910, 1 Civ. Pro. 63.

In an action for a divorce, brought by a wife against her husband, which was commenced by the personal service of the summons and complaint and an order of arrest upon the defendant, who having been held to bail, after appearing and answering, departed from the State and continued to reside in another State, the defendant is liable to be punished for contempt in failing to obey an order directing the payment by him of alimony, where he had knowledge of the existence of the order, and it had been personally served upon him in the State where he was residing. *Davis v. Davis*, 83 Hun, 500, 32 Supp. 10.

To bring a party into contempt, for disobeying a judge's order, the original order must be shown at the time the copy is served. *McCauley v. Palmer*, 40 Hun, 381.

To put parties in contempt for disobedience of a judgment requiring them to execute an instrument of a certain form, a certified copy of the judgment and a copy of the instrument proposed should be served a reasonable time in advance for them to examine them before the peremptory demand for the execution of the instrument is made. *McBair v. Hanson*, 16 Abb. Pr. 399.

In order that the court may adjudge a party to be in contempt for neglect to comply with an order directing her to discover and produce books and papers for inspection, the order must be served on her personally; service on the attorney is not sufficient. *Matter of Smith*, 15 St. Rep. 733. See *McCauley v. Palmer*, 40 Hun, 38, as to effect of service on attorney.

To punish a party in failing to appear and be examined as a witness before trial, a copy of the order requiring him to appear must have been personally served upon him. *Loop v. Gould*, 17 Hun, 585, citing *Tebo v. Baker*, 19 Alb. L. Jour. 398.

Subd. 3. Procedure When Offense Committed Before Referee. **Judiciary Law, § 759.**

§ 759. Order to show cause or issue of warrant when contempt committed before referee.

An order to show cause may be made, or a warrant may be issued, as prescribed in section seven hundred and fifty-seven, by a referee appointed by the court, where the offense is committed upon the trial of an issue referred to him, or consists of a wit-

ness's non-attendance, or refusal to be sworn or to testify, before him. The order or warrant may, in the discretion of the referee, be made returnable before him, or before the court. Where it is made returnable before the referee, he has all the power and authority of the court with respect to the motion or special proceeding, instituted thereby. (Code Civ. Pro., § 2272.)

A referee has no power, on the return of an order to show cause against a witness, who, under advice of counsel, refused to answer a question, to fine the witness to the limit permitted by the Code of Civil Procedure, section 2284, and also impose the entire costs of the proceedings.

It seems that the specification of the amount of \$250 in the statute is a limitation of the fine and not a direction as to its amount, and the reference to the "complainant's costs and expenses" means the costs and expenses on the motion, and not the entire costs of the proceeding. *Matter of Husted*, 37 Misc. 237, 75 Supp. 252.

In *Naylor v. Naylor*, 32 Hun, 228, it is held that the referee may make an order to show cause, returnable before the court, and that the court may then take cognizance of the matter, and has power to proceed in the premises.

A referee appointed to hear and report evidence may punish for a contempt. *People ex rel. v. Miller*, 7 Misc. 7, 59 St. Rep. 202, 29 Supp. 305.

Subd. 4. Procedure upon Notice to Delinquent Officer pursuant to Statute. Judiciary Law, § 758.

§ 758. Notice to delinquent officer to show cause.

Where it is prescribed by law, or by the general rules of practice, that a notice may be served in behalf of a party, upon a sheriff or other person, requiring him to return a mandate, delivered to him, or to show cause, at a term of a court, why he should not be punished, or why an attachment should not be issued against him, for a contempt of the court; the party, in whose behalf the notice is served, may, at the time specified therein, file with the clerk, proof, by affidavit or other written evidence, of the delivery of the mandate to the accused; of the default or other act, upon the occurrence of which, he was entitled to serve the notice; of the service of the notice; and of the failure to comply therewith. Thereupon the proceedings are the same, as where an order to show cause is made, and it, and a copy of the affidavit upon which it is granted, are served upon the accused. (Code Civ. Pro., § 2270.)

Subd. 5. Undertaking and Proceedings to Obtain Discharge. Judiciary Law, §§ 764-768, 771.

§ 764. Amount of undertaking may be indorsed on warrant.

Where a warrant of attachment is issued, the court, judge, or referee, may, in its or his discretion, by an indorsement thereupon, fix a sum, in which the accused may give an undertaking for his appearance to answer. (Code Civ. Pro., § 2275.)

§ 765. Execution of warrant when undertaking not given.

If an indorsement is not made upon the warrant, as prescribed in the last section; or if such an indorsement is made and an undertaking is not given, as prescribed in the next section; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case the sheriff must pro-

duce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance. (Code Civ. Pro., § 2276.)

§ 766. Undertaking to procure discharge.

Where an indorsement is made upon the warrant, as prescribed in the last section but one, the accused must be discharged from arrest, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear, at the time when, and the place where, the warrant is returnable, and then and there abide the direction of the court, judge, or referee, as the case requires. The officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties concerning their property and circumstances. (Code Civ. Pro., § 2277.)

§ 767. When habeas corpus may issue.

If the accused is in the custody of the sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court. (Code Civ. Pro., § 2278.)

§ 768. Sheriff to file undertaking with return.

The sheriff or other officer must file the undertaking, if any, taken by him, with the return to the warrant or writ of habeas corpus. (Code Civ. Pro., § 2279.)

§ 771. Punishment upon return of habeas corpus.

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ is directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer. (Code Civ. Pro., § 2282.)

A warrant to punish for contempt need not specify the contempt nor any of the proceedings upon which the warrant rests. Disobedience to an order requiring the payment of money in court to the officers thereof, except where it is due upon a contract or for a breach thereof, may be punished as for contempt, although the amount thereof could be collected upon execution. Where there is no jurisdictional defect the court will refuse to review the mandate of another court of general jurisdiction on habeas corpus. *People ex rel. Pond v. Tamsen*, 15 Misc. 364.

A warrant of attachment for contempt which is not based upon a final order adjudging contempt and directing punishment is insufficient on habeas corpus proceedings to justify the retention of the respondent. *Matter of Crosher*, 25 Abb. N. C. 89, 11 Supp. 504.

Upon a writ of habeas corpus, only the jurisdiction or the power of the court to make the order or judgment under which the relator is detained can be attacked. *White v. Feenaughty*, 51 Misc. 468, 101 Supp. 700.

A county judge has no power, upon the return to a writ of habeas corpus, to order the discharge of an executrix, committed to jail for a civil contempt in failing to pay certain sums of money to persons named in a surrogate's decree, where no notice has been given to the persons who have an interest in continuing the imprisonment or restraint, or to their attorney; such an order is void under subdivision 1 of section 2038 of the Code of Civil Procedure, and affords no protection to a sheriff, in a proceeding to punish him for a civil contempt in releasing her from custody, because made by an officer of limited statutory jurisdiction without taking the necessary jurisdictional steps, if the order contains no recital of jurisdictional facts and the sheriff cannot prove such facts by extrinsic evidence. *Matter of Leggat*, 162 N. Y. 437, rev'g 47 App. Div. 381, 62 Supp. 208, 30 Civ. Pro. 108.

Where, upon the writ of habeas corpus to procure the discharge of a person committed for contempt in failing to obey an order to appear before a referee to testify as a witness in supplementary proceedings, the county judge, before whom the writ was made returnable, discharged the relator from custody, the Appellate Division has no power to reverse the order of the county judge "as a matter of law and not as a matter of discretion" unless all the jurisdictional facts are admitted or conclusively established; and where such facts are not traversed or denied, and determined in favor of the relator by the county judge, the Appellate Division has no power to disturb his conclusions upon questions of law only, if there is any evidence to support his findings, or any view of the facts that required or justified him in discharging the relator from custody. *Matter of Depue*, 185 N. Y. 60.

ARTICLE VII.

PROCEEDINGS ON RETURN OF WARRANT OR ORDER TO SHOW CAUSE.

Judiciary Law, §§ 769, 770, 772, 773, 774.

Subd. 1. The hearing, 756.

§ 769. *Interrogatories and proofs*, 756.

§ 772. *Punishment upon return of order to show cause*, 757.

Subd. 2. The final order, 760.

§ 770. *Final order directing punishment*, 760.

Subd. 3. The punishment, 765.

§ 773. *Amount of fine*, 765.

§ 774. *Length of imprisonment*, 765.

Subd. 1. The Hearing. Judiciary Law, §§ 769, 772.

§ 769. *Interrogatories and proofs.*

When the accused is produced, by virtue of a warrant, or a writ of habeas corpus, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent

proofs, the court, judge, or referee must determine whether the accuser has committed the offense charged. (Code Civ. Pro., § 2280.)

§ 772. Punishment upon return or order to show cause.

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion, and, if the determination is to the effect specified in the last section but one, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process. (Code Civ. Pro., § 2283.)

Proceedings in contempt are to be construed *stricti juris* and every condition precedent to the exercise of the power must show a literal compliance with the law. *Flor v. Flor*, 73 App. Div. 262, 76 Supp. 813.

Proceedings in contempt are to be construed *stricti juris*; all the rights of the defendant must be carefully protected, and he cannot be adjudged guilty unless there has been a literal compliance with the law. *Goldie v. Goldie*, 77 App. Div. 12, 79 Supp. 268, 12 Anno. Cas. 175.

Where parties, in response to an order to show cause why they should not be punished for contempt, appeared and answered, they thereby waived any defects in the affidavit upon which the order was issued. *People v. Court of Sessions*, 147 N. Y. 290.

The objection that a proceeding to punish a person for contempt was not instituted by an attachment or an order to show cause, as provided by the Code of Civil Procedure, section 2269, will be deemed to have been waived if not taken at the Special Term. *Macgille v. Leonard*, 102 App. Div. 367, 92 Supp. 656; *aff'd* without opinion, 181 N. Y. 558.

The proper remedy to obtain relief by a party in contempt is by a motion in the court in which the order was granted; where a judge who made the order was no longer a member of the court, it was held the order was properly made before any judge sitting at Special Term. *Davidson's Case*, 13 Abb. 129; *People v. Murphy*, 1 Daly, 462. Where an attachment is regular on its face, with the recitals necessary to give jurisdiction, a party moving to set it aside for defects in the proceedings must show affirmatively the defect, or enough to throw the burden of proof on the other party. *Baker v. Stephens*, 10 Abb. Pr. N. S. 1.

Upon the return of an order to show cause why a judgment debtor should not be punished for failing to appear pursuant to an order for his examination, the court has power in its discretion upon the debtor's second default to issue an attachment returnable forthwith and bailable in a sum fixed, instead of issuing a commitment. *Matter of Nejez*, 54 Misc. 38, 104 Supp. 505.

In a proceeding to punish a judgment debtor for contempt in making a transfer of property in violation of the order of injunction, the necessary testimony can be taken directly in the proceeding, either under subpœna or order under the Code of Civil Procedure, section 2280; and the judgment creditor is not entitled to a prior order for a reference to take the

witness's testimony. *People ex rel. Tuell v. Paine*, 92 App. Div. 303, 86 Supp. 1109.

The Code of Civil Procedure provides that upon the return of an order to show cause in proceedings for contempt, the questions which arise must be determined as upon any other motion. § 2283. The court may of its own motion direct a reference to determine and report upon a question of fact arising upon a motion. *Code Civ. Pro.*, § 1015; *People ex rel. Alexander v. Alexander*, 3 Hun, 211; *Aldinger v. Pugh*, 57 Hun, 181, 185, 10 Supp. 684; aff'd, 132 N. Y. 403.

The fact that an order to show cause is irregular, where it does not mislead, is not ground for setting aside the order punishing for disobedience. *People v. Kenny*, 2 Hun, 346. If the order appears to be valid, the person served is bound to obey the order or move to set it aside; the only issues on the application to commit are as to the regularity of the proceedings and the excuse for disobedience. *Hilton v. Paterson*, 18 Abb. 245. After submitting to answer interrogatories, it is too late to raise the point that the judgment, which is the foundation of the proceedings, has not been served. *People v. Kearney*, 21 How. 74. Where, on an order to show cause, the judgment debtor fails to appear, and the county judge declares him in contempt, without further proof, it is irregular; the moving party must make out a case. *Tinkey v. Langdon*, 60 How. 180. If a party refuses to answer interrogatories, the order for commitment should specify such refusal as the misconduct; it is irregular to commit him for disobedience of the original order. *DeWitt v. Denise*, 30 How. 131. There must be clear proof of the disobedience to authorize punishment. *Potter v. Low*, 16 How. 549. And the accused party may read, in addition to his answers to interrogatories, affidavits negating willful disobedience of the order for the violation of which it is sought to punish him. *People v. Murphy*, 1 Daly, 462. The moving party may read affidavits in reply. *Smith v. Smith*, 23 How. 134; aff'd, 14 Abb. 468.

Interrogatories are only necessary in cases where the act or omission constituting the contempt is either denied or not admitted, and when such act or omission is expressly admitted by defendant it is not necessary that interrogatories should be filed. *People v. Cartwright*, 11 Hun, 362. Interrogatories are unnecessary when the contempt consists of the admitted refusal to answer questions, and the party has been served with the affidavits and order to show cause, and is before the judge, and has full opportunity to answer. *Taylor v. Baldwin*, 14 Abb. 166; *Watson v. Fitzsimmons*, 5 Duer, 629; *People v. Campbell*, 40 N. Y. 133; *Pitt v. Davison*, 37 N. Y. 235; *Lathrop v. Clapp*, 40 N. Y. 328. Where the proceedings are instituted by an order to show cause, interrogatories are not necessary, even though the order does not show in what respect the injunction is claimed to have been violated, nor the punishment desired. *Mayor v. N. Y. & S. I. Ferry Co.*, 40 Super. Ct. 300; aff'd, 64 N. Y. 622.

And an order of reference may, in such a case, even in criminal contempts, send the matter to a referee without filing interrogatories. *People v. Alexander*, 3 Hun, 211. Where there was a motion for an attachment or other relief, and the matter was sent to a referee, and it was heard on his report, interrogatories were held to be waived. *Matter of Nichols*, 54 N. Y. 62. Interrogatories should be confined to the fact of the service of the order or process, and to the acts or neglects constituting the violation. *Brown v. Andrews*, 1 Barb. 227.

Where it is proper to impose any condition on vacating an attachment for contempt, this must be done in the first instance, and if an order vacating an attachment has once been entered, such order cannot be rescinded for the purpose of imposing a condition, nor can it be resettled or modified. *Matter of Bradner*, 87 N. Y. 171. It is no answer for an executor that the decree was made on joint petition of parties not entitled to join. *Estate of Kellinger*, 2 Civ. Pro. 68. The inability of the person disobeying may be considered. *Goodenough v. Davids*, 4 Law Bull. 35. In proceedings against the members of a common council for contempt, it is no defense that the assent of the mayor was wanting, or that their disobedience was harmless, or that the act enjoined was a nullity. *People v. Dwyer*, 90 N. Y. 402.

An order to show cause why a stay of proceedings should not be granted pending an appeal from an order of the Appellate Division affirming a judgment, itself contained a stay "until the hearing and determination of this motion," which was determined and denied the day of the hearing, though the order denying it was not entered until ten days thereafter. *Held*, that a motion to punish as for a contempt for proceeding in the interim could not prevail. *Dady v. O'Rourke*, 71 App. Div. 557, 75 Supp. 821.

An appeal by the head of an executive department of a municipal corporation from an order for mandamus whereby he is required to perform an act in his official capacity is an appeal by the municipal corporation; the proceedings under the writ are stayed by the notice of appeal; and a delay of two hours in the interval between service of the writ and the appeal therefrom is not a contempt. *Crocker v. Sturgis*, 38 Misc. 596, 78 Supp. 77.

Where a party furnishes a legal excuse for not appearing on the return of an order for an examination and the court in consequence denies the motion to punish him for contempt, upon submitting to the required examination and paying the disbursements incurred by reason of the default, an application to impose further conditions will be denied. *Tuell v. Paine*, 71 Supp. 1121.

On the return of an order to show cause why an attorney should not be punished for contempt and for such other and further order as may to the

court seem just, etc., an order requiring such attorney to deposit money with a trust company is improper, as such relief was not indicated in the motion papers. *Matter of Weeks v. Coe*, 111 App. Div. 337, 97 Supp. 704.

Where the alleged misconduct is denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but simply perform the office of pleadings or statements of the charges relied upon. Affidavits are sufficient to originate the proceedings, but upon the trial of the issues the common-law rules of evidence must be observed. *In the Matter of Eldridge*, 82 N. Y. 161 (162).

To justify an order punishing an assignee for benefit of creditors for contempt in not producing checks for plaintiff's inspection, pursuant to an order of the court, it must be shown that the assignee willfully refused to comply with the order. *Watertown Paper Co. v. Place*, 51 App. Div. 633, 64 Supp. 673.

Subd. 2. The Final Order. Judiciary Law, § 770.

§ 770. Final order directing punishment.

If it is determined that the accused has committed the offense charged; and that it was calculated to and actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, not before the judge or referee; the court, judge or referee must make a final order accordingly, and directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly. (Code Civ. Pro., § 2281.)

Where a proceeding is instituted against a party charged with contempt by affidavit and attachment, and it is adjudged that he is in contempt, a warrant of commitment must issue as prescribed by section 2281 of the Code of Civil Procedure; but, where the proceeding is begun by an affidavit and order to show cause, the offender may be committed by a certified copy of an order so made, as prescribed by section 2283 of the Code of Civil Procedure. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 Supp. 700.

The fact that the defendant has been given by the terms of the order an opportunity to comply with the order before commitment issues does not affect the validity of the order. *Matter of Blumenthal*, 22 Misc. 704, dist'g *Bradbury v. Bliss*, 48 Supp. 912.

An order punishing a defendant for contempt is fatally defective if it does not contain an adjudication that the act of the defendant was calculated to or did actually defeat, impair, impede, or prejudice the rights or remedies of the plaintiff as required by section 2281 of the Code of Civil Procedure. *Guerrier v. Coleman*, 135 App. Div. 46, 119 Supp. 895.

It must be made to appear that the act or omission complained of is one by which "the right or remedy of a party may be defeated, impaired, impeded, or prejudiced," and this must be adjudged to authorize the infliction

tion of punishment. *Fischer v. Raab*, 81 N. Y. 235. To punish a party for contempt in a civil proceeding the contempt must be such as to defeat, impair, impede, or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed. *Sandford v. Sandford*, 2 St. Rep. 133; *Cleary v. Christie*, 41 Hun, 566.

An order to punish one for a contempt in the non-payment of alimony must adjudge that the failure to pay had defeated, impaired, or prejudiced the party applying therefor in his rights; if this is omitted the order is radically defective, and the punishment cannot be inflicted. *Mendel v. Mendel*, 4 St. Rep. 556. The same principle is held as to invalidity of order in *Fall Brook Co. v. Hecksher*, 4 St. Rep. 657.

A reference having been made on a motion in an action for an injunction, and the order providing that the unsuccessful party should pay the referee's fees, the referee found the facts for defendant and caused a notice to be served on plaintiff stating that his report was ready, and the amount of his fees. Plaintiff not having paid the fees, the court, on proof, granted an order requiring plaintiff to pay within three days, or show cause why he should not be committed for disobeying the order, and on return of the order and proof of non-payment, an order directing the plaintiff to be committed for contempt was granted. *Held*, error, as there were no facts showing, or adjudication holding, that the alleged misconduct defeated, impaired, impeded, or prejudiced any right or remedy of the defendant. *Fisher v. Raab*, 81 N. Y. 235.

Where an order expressly adjudicates that the misconduct was "calculated to and did defeat, impair, impede and prejudice a right or remedy of the petitioner," and the evidence upon the reference supports that conclusion, it is sufficient as an adjudication of injury within section 2284. *Matter of Morris*, 45 Hun, 167. Where it was claimed that the order was void because it did not contain a statement that the disobedience referred to as the contempt had defeated, impaired, impeded, or prejudiced some right of the defendants in the former action, and the contempt, the order, and the affidavit upon which it was founded, stated in detail the proceedings which it was claimed the disobedience affected, it was held that this was a full compliance with the requirements of the rule with respect to a contempt. *Fischer v. Langbein*, 103 N. Y. 84; followed, *Prince Mfg. Co. v. Princess Metallic Paint Co.*, 51 Hun, 443, 20 St. Rep. 923, 4 Supp. 348, aff'g 2 Supp. 682.

A statement in the order that the contempt did hinder, etc., instead of saying in the words of the statute that the misconduct did hinder, etc., does not invalidate the order. *Wheelock v. Noonan*, 55 Super. Ct. 302.

Misconduct which can be punished as a civil contempt must be such as to defeat, impair, etc., the right of a party, and it must appear that the

alleged misconduct has that effect. A person cannot be punished for failing to pay over money or stand committed for contempt until a second order be made after his refusal to pay the money, a copy of the first order having been served upon him and a demand made for the moneys directed to be paid thereby. *First Nat. Bank of Plattsburgh v. Fitzpatrick*, 80 Hun, 75, 61 St. Rep. 766. An order adjudging a person in contempt for disobedience which omits to state that the misconduct complained of defeated, impaired, etc., the right or remedy of a party is fatally defective. *Wolf v. Buttner*, 57 St. Rep. 861, 6 Misc. 119.

An order committing the defendant for non-payment of referee's fees ordered to be paid is defective and should be reversed, if it fails to adjudicate, as required by the Code of Civil Procedure, sections 2281, 2283 (Judiciary Law, §§ 770, 772), upon the return of the order to show cause, that defendant has committed the offense charged, and that the offense was calculated to, or did, actually defeat, impair, or prejudice the rights and remedies of the plaintiff. *Mahon v. Mahon*, 50 Super. Ct. 92.

A commitment which imposes a fine of a specified amount, with interest from specified day, is sufficiently definite. *Estate of McMaster*, 14 Civ. Pro. 195. The commitment is not defective in omitting to recite that notice was given to the party imprisoned of the application for orders which were entered to supply defects in preceding orders in the same proceeding, such preceding orders being mentioned in the commitment and notice having been given of the application upon which they were made. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 183, 11 St. Rep. 558. All that can be required in a commitment is that it shall distinctly apprise person committed of the sum he must pay, in order to secure his release, provided it sets out that the contempt was calculated to and did defeat, etc., the remedy of the moving party. *Matter of Bernhard*, 16 St. Rep. 240. Provisions of section 2278 apply only to proceedings instituted by warrant of attachment and not to those commenced by order to show cause. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305. This case was reversed on appeal, 50 Hun, 243, 20 St. Rep. 48, 3 Supp. 142; and it was held that under section 2285, it is not sufficient for the commitment to refer to another order and judgment as specifying the acts required to be done; the commitment must specify the act to be done, and no reference can be had to any other paper to supply the defect. The parties proceeding to enforce penalties for commitment must either proceed by arrest under a certified copy of the order, or by arrest under a commitment, but they cannot do both; they must elect their course of procedure and be governed by such election in all subsequent stages of the proceeding. It seems that if the commitment had recited the order so that it became part thereof, it would have been sufficient, but the order was not made part of the commitment by a simple reference to it.

An order for the commitment of a witness for contempt is not necessary under section 856, although the offender is brought before the judge on an order to show cause. A commitment following the language of the statute is good. *In re McAdam*, 5 Supp. 387, dist'g *People ex rel. McDonald v. Keeler*, 99 N. Y. 463. An order was made after notice, requiring a husband to pay to his wife certain arrears of alimony *pendente lite*, within a given number of days, and providing that upon non-compliance an order of arrest and commitment for contempt of court might issue; *held*, proper under section 2281. *Kuhn v. Kuhn*, 4 Supp. 952, 23 St. Rep. 387. An order committing a defendant in divorce for failure to pay alimony must adjudge that his failure to pay has defeated, impaired, impeded, or prejudiced plaintiff in his rights. *Mendall v. Mendall*, 4 St. Rep. 556. Whether or not the misconduct alleged did in fact defeat, impair, impede, and prejudice the complaining party is to be determined from the facts and circumstances in the case. *Hart v. Johnson*, 43 Hun, 505.

In proceedings to have defendant adjudged guilty of contempt under subdivision 2 of section 14, in procuring a stay of proceedings on appeal by putting in fictitious sureties to the undertaking, and in which an order was made adjudging him guilty of contempt, it was held essential to the validity of the order that an adjudication or decision appear establishing that the person for whose benefit the fine was imposed has in truth and fact been prejudiced by the illegal proceedings complained of. *Cleary v. Christie*, 41 Hun, 566. A precept or commitment may not be issued without an adjudication of contempt, nor without proof that the contempt has injured a creditor in his right or remedy. *Blake v. Bolte*, 10 Misc. 333, 31 Supp. 124, 63 St. Rep. 408, 24 Civ. Pro. 166.

An order adjudging a person in contempt, and directing his commitment for a failure to pay alimony awarded in a divorce suit, need contain no adjudication that judgment could not be enforced by means of security, or the sequestration of his property. *Ryer v. Ryer*, 67 How. 369. In a Surrogate's Court, a warrant committing a witness for refusing to answer need not contain the particular interrogatories refused to be answered. *Matter of Jones*, 6 Civ. Pro. 250.

Where a defendant is ordered committed for contempt, it must be to the jail without the limits. *People v. Fancher*, 2 Hun, 226. See *Amerman v. Stokes*, 3 St. Rep. 356, holding that the enforcement of orders and decrees directing trustees to pay over money is by an execution against the person, or a precept of commitment which would entitle a party to the benefit of the jail liberties. Punishment for a contempt cannot be inflicted in cases where an execution can issue, viz., on a final decree for a sum of money.

An order punishing a person for a civil contempt which does not ad-

judge that he committed the act claimed to constitute the contempt, or that such act was calculated to or actually did defeat, impair, impede, or prejudice the rights or liabilities of the moving party, is fatally defective. *Dailey v. Fenton*, 47 App. Div. 418, 62 Supp. 337, 7 Anno. Cas. 222.

An order punishing a person for contempt of court, in a civil action, must contain an adjudication that he is guilty of the contempt and that the act complained of not only has a tendency to, but actually does, defeat, impair, impede, or prejudice the rights or remedies of the complaining party. *Socialistic Co-operative Pub. Ass'n v. Kuhn*, 51 App. Div. 583, 64 Supp. 933.

One cannot be adjudged in contempt of court in the absence of an adjudication that the offense charged was calculated to, or actually did, defeat, impair, or prejudice the rights or remedies of the complaining party. *Obermeyer & Liebman v. Adisky*, 123 App. Div. 272, 107 Supp. 949.

An order adjudging a person guilty of contempt which describes the conduct constituting the contempt as "willfully disobeying the order requiring him to appear on June 14, 1904, for examination," sufficiently apprises the delinquent party that his disobedience consisted in not appearing, and is not subject to the criticism that the words quoted were merely descriptive of the order of June 14, 1904, and did not sufficiently set forth the act or omission of which he was adjudged guilty.

In such a case the court has power under section 2284 of the Code of Civil Procedure to impose upon the delinquent party a fine of \$250 and direct its payment to the complainant. *New Jersey Foundry & M. Co. v. Siebert*, 45 Misc. 357, 90 Supp. 468.

Where a commitment for contempt does not, in addition to the fine imposed, direct the imprisonment of the offender to continue until he performs the act required by him, section 2285 of the Code has no application to the case and the sheriff, after the expiration of six months, may lawfully discharge him from imprisonment. *Hommel v. Buttlings*, 46 App. Div. 206, 61 Supp. 811.

A commitment for contempt committed in the presence of the court which is made in the alternative, directing the payment of a fine or, in default thereof, imprisonment for a definite term, when no formal order was made and served on defendant, is defective, in that it allows the sheriff to exercise this judgment and to take the debtor into custody at once upon a demand of the fine and non-compliance therewith. The proper practice in such a proceeding is that an order should have first been made and entered and served upon the judgment debtor, and after he has failed to comply with the condition, and upon proof of such failure, an absolute and final order should be made adjudging him absolutely guilty of contempt, and a commitment for his punishment issued accordingly. *Matter of Falkenburg*, 19 Misc. 418, 43 Supp. 1137.

An order adjudging a purchaser of property at a partition sale to be in contempt because of his failure to comply with a previous order directing him to complete his purchase, which does not specify the sum to be paid by him, as provided by section 2285 of the Code, but refers to the previous order as specifying the acts to be done, is fatally defective. *Burnham v. Denike*, 53 App. Div. 407, 65 Supp. 1028.

Subd. 3. The Punishment. Judiciary Law, §§ 773, 774.

§ 773. Amount of fine.

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section. (Code Civ. Pro., § 2284.)

§ 774. Length of imprisonment.

Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. (Code Civ. Pro., § 2285.)

The distinction between contempts which consist of omissions to do acts which, when done, relieve from imprisonment, and those affirmative acts of resistance to the orders of the court wherein imprisonment may be imposed on the offender, is pointed out in *King v. Barnes*, 113 N. Y. 476; *Fenlon v. Dempsey*, 7 Supp. 435; *King v. Flynn*, 37 Hun, 330; *People ex rel. Peirce v. Brice*, 62 App. Div. 593 (594), 71 Supp. 196.

The history of the power of courts of chancery and Surrogates' Courts to punish as for contempt for failure to pay over moneys as directed by decree, considered. *People v. Marshall*, 7 Abb. N. C. 380. The distinction between the commitment for contempt for non-payment of money and upon conviction for misconduct is discussed and pointed out by Woodruff, J., in *People v. Cowles*, 4 Keyes, 38. And it is said that in the former case the process is strictly and purely remedial, and in the latter preventive, and in most instances wholly so.

It does not deprive a court of jurisdiction, or prevent a final decision on the merits, for a court to suspend final action for a period, to enable the party in contempt to comply with the original order, or to perform some

act as a substitute for such compliance. *People v. Bergen*, 53 N. Y. 404. The costs should be taxed and inserted in the order as part of the fine imposed. *Albany City Bank v. Schermerhorn*, 9 Paige, 372. For direction as to form of order, see *People v. Rogers*, 2 Paige, 103.

The complaint of a party was stricken out as a punishment for a contempt for refusing to produce a paper in possession of his counsel in *Shelp v. Morrison*, 13 Hun, 110. Answer was stricken out. *Walker v. Walker*, 82 N. Y. 260. See also *McCrea v. McCrea*, 58 How. 220.

The non-production of books and papers under an order of the court, without any satisfactory explanation therefor, constitutes a willful contempt of court. On such refusal the treasurer of a company was fined the expenses of the proceeding and the corporation was fined \$250 and its answer stricken out and plaintiff allowed to proceed as on default. *Edison Electric Light Co. v. Tipless Lamp Co.*, 72 Misc. 117.

On fining a party for contempt the court will adhere strictly to what is proven, taking nothing upon inference and giving him the benefit of every doubt and defect in the proof. *Van Valkenburgh v. Doolittle*, 4 Abb. N. C. 72.

After the issue of a warrant of attachment the court cannot permit the accused to purge himself without making reparation as provided by the Code, sections 2281 and 2284. *People ex rel. Baldwin v. Miller*, 59 St. Rep. 702, 9 Misc. 3.

A decree was granted against defendant in divorce by which he was required to give security for the maintenance of plaintiff, a copy of the decree was served on defendant, and a demand for security and payment of costs made, which was refused; aailable attachment was issued, and on its return a motion was made to vacate it. The court denied the motion, fined the defendant for misconduct, and ordered him to give the security. *Held*, that the court had jurisdiction to grant such relief as the facts and circumstances warranted; that it had authority to punish by fine or imprisonment, or either; and that it was sufficient to serve a copy of the decree, with a statement of the alimony unpaid, and a demand for the same; the fact that the decree authorizes an execution to issue in case of failure to pay the alimony does not estop plaintiff from enforcing its payment by proceedings for contempt. *Park v. Park*, 80 N. Y. 156.

It is not sufficient to protect a party against punishment under section 2284, for failure to pay over moneys pursuant to an order made upon the accounting as trustee, to show that an action may be maintained for the same cause, but it must be shown to be a case where the law has specially prescribed the action as a means of redress. *Matter of Morris*, 45 Hun, 167. Where a trustee has been adjudged guilty of contempt because of failure to pay over moneys received by him in that capacity, the court may impose, as a fine, the amount which he has received and failed to pay, and

direct him to be imprisoned until he shall pay the fine. *Matter of Morris*, 45 Hun, 167. It was held in this case that it was doubtful whether any allowance by way of costs and expenses could be made in contempt proceedings, and still further that no allowance can be made for counsel fees.

Where it appears that an order has been made that a receiver has moneys in his hands which he failed to pay over on demand, actual loss and injury are sufficiently shown to justify an order for his commitment. Such an order is regular notwithstanding the fact that the court did not impose the payment of the indemnity in the form of a fine, it being sufficient to state in the order that the moving parties were injured to a certain amount and requiring its payment. It is not necessary to specify the duration of the imprisonment, as under section 2285 it is provided that where the misconduct in question consists in the omission to perform an act or duty which it is in the power of the person to perform, he shall be imprisoned until he performs such act or pays the fine imposed. Where there is no proof of what the costs and expenses had been, it was held erroneous to fix them at the sum of \$250. *People ex rel. Surety Co. v. Anthony*, 7 App. Div. 132, citing *People ex rel. Clark v. Grant*, 11 St. Rep. 559.

Where a person, upon whom a subpoena has been served, has been adjudged to have committed a contempt in refusing to obey it, the court is expressly authorized by section 2284 to impose a fine for the disobedience of the subpoena, though no actual loss or injury to the party subpoenaing him has been occasioned. *People ex rel. Duffus v. Brown*, 46 Hun, 320, dist'g *Carrington v. Hutson*, 28 Hun, 371.

In proceedings to punish for contempt in refusing to produce books of a corporation, as required by an order and subpoena, the power of the court to award an allowance by way of indemnity for legal expenses must be exercised upon evidence in legal form, as upon the trial of an action. *Fenlon v. Dempsey*, 50 Hun, 131, 19 St. Rep. 231, 2 Supp. 763, 22 Abb. N. C. 114, 15 Civ. Pro. 393.

The amount of fine which may be imposed under sections 2281 to 2284 must be based upon proof of damages actually sustained. *Moffatt v. Herman*, 116 N. Y. 131, citing *Sudlow v. Knox*, 7 Abb. Pr. N. S. 411; *Dejonge v. Brenneman*, 23 Hun, 332; *Clark v. Bininger*, 75 N. Y. 344; *King v. Flynn*, 37 Hun, 329. *Moffatt v. Herman*, 116 N. Y. 131, 17 Civ. Pro. 357, aff'g 17 Abb. N. C. 107, rev'g 8 Civ. Pro. 369, is distinguished in *Martin Cantine Co. v. Warshauer*, 7 Misc. 412, where it is held that where a false answer was interposed which prevented plaintiff from collecting a claim which he could have otherwise collected, the party interposing the answer is guilty of contempt; s. c., 23 Civ. Pro. 379, 28 Supp. 139, 58 St. Rep. 569.

The court has no right to fine arbitrarily, or to take the opinion of the

injured party as a standard, but the adjudication as to damages must be based on evidence. *Simmonds v. Simmonds*, 6 Wkly. Dig. 263. The amount of a fine is a matter of computation. *Sudlow v. Knox*, 7 Abb. 411. But where there has been actual injury, the court cannot impose a mere nominal fine. *Lansing v. Easton*, 7 Paige, 364. The amount of the fine to indemnify must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for damages. *Sudlow v. Knox*, 4 Abb. Ct. App. Dec. 326. The question of damages may be heard before a referee as part of the contempt proceedings, and where the testimony showed that the party charged had, contrary to the prohibition of an injunction, collected and appropriated a certain sum of the assets of the moving party, it was held that *prima facie* the plaintiff was damnified to that extent by the transaction. *Harteau v. Deer Park Blue Stone Co.*, 3 T. & C. 763. The party in contempt must be imprisoned till the fine is paid. *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 512; aff'd, 9 N. Y. 263. A fine in the amount of the costs and expenses is all that is proper, unless there is an adjudication that the act has produced loss. *People v. Oliver*, 66 Barb. 570. The degree of punishment to be inflicted is limited by this section to a fine sufficient to indemnify the aggrieved party for the actual loss or injury inflicted by the misconduct, and to sustain the imposition of a fine for loss or injury the fact of the existence of the loss must be proved by competent evidence. *Fall Brook Co. v. Hecksher*, 4 St. Rep. 657. Where there is an adjudication that the misconduct was calculated to, or did defeat the rights or remedies of the moving party, a fine is proper and is limited to \$250, unless actual loss or injury has been suffered, when the fine will cover such loss. In case of no pecuniary loss, only the necessary costs and expenses will be imposed. *People v. Compton*, 1 Duer, 512; *Clark v. Bininger*, 75 N. Y. 344; *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637. Where the court, in punishing a violation of an injunction, ordered a party to pay certain damages as well as costs, and it did not clearly appear such damages had in fact resulted from the act complained of, the order was reversed. *Lyon v. Botchford*, 25 Hun, 57. The rule that actual indemnity to the party will be given, and upon evidence of the facts was held in *Dejonge v. Brennenman*, 23 Hun, 332; *King v. Flynn*, 37 Hun, 329. In supplementary proceedings the value of the property disposed of, and not the amount of the judgment, regulates the amount of the fine. *Reynolds v. Gilchrest*, 9 Hun, 203; *Ross v. Clusman*, 3 Sandf. 676; *Feely v. Glennen*, 2 Law Bull. 19. Where \$500 was allowed for loss and injury, on violation of an injunction, it was held on appeal to be not as costs, but under section 2284, for actual damages sustained by the misconduct of the defendant. *Brett v. Brett*, 22 Hun, 547. On proceedings to punish for contempt of mandamus, the fine is limited to costs and ex-

penses of the contempt proceeding, where the contempt is not willful, and no pecuniary loss has been sustained. The costs in the mandamus case cannot be included. The court may include as a fair item of expense a compensation to the relator's attorney for his expenses in the proceedings. *People v. State Line R. R. Co.*, 14 Hun, 371; aff'd, 76 N. Y. 294. A counsel fee in excess of cost and expenses cannot be added (compare 33 Hun, 547) to the fine sufficient to indemnify the party, but it does not invalidate the order. The party may be held till he pays the legal items. *People v. Jacobs*, 66 N. Y. 8. The counsel fees are limited to the contempt proceedings. *Van Valkenburgh v. Doolittle*, 4 Abb. N. C. 72. Where the contempt consists of interfering with perishable property, the order should not absolutely require its return, but should liquidate its fair value to be repaid if a return is impossible. *Albany City Bank v. Schemerhorn*, 9 Paige, 372, rev'd on another point, 10 Paige, 263.

A person interfering with property in the possession of a receiver under a mistake of law will be chargeable with the costs of the proceedings against him for contempt, though he may be excused from further punishment. *Noe v. Gibson*, 7 Paige, 513. Where the party accused acted in good faith, only motion fees and disbursements were charged against him. *People v. Cooper*, 20 Hun, 486. Where the sheriff refused to take the person charged before an officer to give bail, no fees were allowed him as against the party in his custody. *People v. Tafft*, 3 Cow. 340. Where a defendant in disobeying an injunction acted under the erroneous advice of his counsel that it was suspended by an appeal taken, the fine should not exceed plaintiff's actual damages and costs, no counsel fees to be included. *Power v. Athens*, 19 Hun, 165.

The court may punish for contempt one who fails to produce books pursuant to a subpoena *duces tecum*. The imposition of the fine is not limited to a case where actual loss or injury is not shown. *Holly Mfg. Co. v. Venner*, 26 Supp. 581. In the absence of evidence that the defendant's disobedience occasioned any actual loss or injury to the plaintiff beyond costs and expenses of the proceedings to punish, a fine to the amount of the judgment is not authorized. *Devereaux v. Clifford*, 11 App. Div. 401, citing *Fall Brook Coal Co. v. Hecksher*, 42 Hun, 534, which holds that in such a case the court should fine the defendant not exceeding \$250, in addition to costs and expenses of the proceedings, and directing his imprisonment until he should appear and submit to examination and pay the fine and costs imposed upon him. It seems that the provisions of section 2284 as to punishment of a party for violation of an order are not exclusive of other proceedings, and that an action may be maintained even where the contempt proceedings are authorized. *Porous Plaster Co. v. Seabury*, 43 Hun, 611, 7 St. Rep. 249. An order adjudging defendant in contempt for refusal to deliver certain property is void where it is

shown that the title to the property is in dispute. Where there is no proof of loss to creditors, an order committing defendant for refusal to deliver property to the receiver until he pay a fine of \$500 is erroneous, since under section 2284 the court can summarily fine a party for misconduct only to an amount of \$250 and costs. *Gallagher v. O'Neill*, 3 Supp. 126, 21 St. Rep. 163. Courts will not permit the course of justice to be stayed or prevented by fictitious sureties or fraudulent bail. Where a worthless surety has been imposed on the court, the fraudulent surety will be punished by a fine to the end that the loss occasioned be made good if possible. *Diamond v. Knoepel*, 3 St. Rep. 291, citing *Hill v. L'Eplattenier*, 5 Daly, 534; *Eagan v. Lynch*, 3 Civ. Pro. 236; *Nathans v. Hope*, 5 Civ. Pro. 401.

The giving of worthless sureties upon a bond to discharge a mechanic's lien is contempt of court for which the party may be fined under section 2284. It is not alone the right of the lienor to ultimate recovery in an action of foreclosure which is affected by the giving of the worthless bond. The bond takes the place of the property, and the law contemplates substantial security to the lienor. When such a bond is given, the validity of the lien is assumed and the right of the lienor to complete security in the place of the land is unquestioned. The fine must be limited to such an amount as to indemnify the aggrieved party for the actual loss and injury sustained so far as that loss is in excess of \$250 and costs. It seems that the court has power, as a condition of waiving imprisonment which it has a right to impose, to exact the performance of conditions which could not be imposed as a fine. *McAveney v. Brush*, 1 App. Div. 97, 68 St. Rep. 178.

A person who justifies as a surety on a bond to secure the release of premises from a mechanic's lien, and who claims he is the owner of property for which in fact he paid nothing, but gave a mortgage for the whole amount, and also for the costs of a building which he erected thereon, and which property he conveyed a month after his justification without consideration to the party upon whose property the lien existed, is guilty of misconduct, under subdivision 2 of section 14 of the Code of Civil Procedure, and such misconduct actually deceives and prejudices the rights and remedies of the petitioner, within the meaning of section 2281 of the Code of Civil Procedure, and the court should punish him by fine or imprisonment. *Matter of Hay Foundry & Iron Works*, 22 App. Div. 87.

An executor for conduct prejudicial to the legatees in failing to account for funds in his hands when ordered to do so is guilty of contempt and properly fined the value of the property misappropriated. A fine of this character is for the benefit of the creditors. *Matter of Pye*, 18 App. Div. 306; aff'd, 154 N. Y. 773.

The Surrogate's Court has power to impose a fine upon a witness committed for contempt in refusing to testify, not exceeding the amount of

costs and expenses, and \$250 besides. Although actual loss or injury be not shown, error therein cannot be reviewed on habeas corpus and certiorari. *Matter of Jones*, 6 Civ. Pro. 250.

Proceedings to punish an administratrix for contempt in disobeying a decree directing the payment of money are addressed to the discretion of the court; and if the respondent is unable to comply with the terms of the decree, and is in actual confinement for disobedience to it, and the circumstances are such as to commend an application for relief to the court an application to punish will be denied. *Estate of Battle*, 13 Civ. Pro. 27.

In fixing an amount to be paid by an executor upon an adjudication of contempt in failing to comply with a decree requiring the payment of an infant's share to a general guardian when appointed, he should be credited with sums admittedly paid for the infant's support and maintenance before the guardian's appointment. *Matter of Schweifert*, 25 Misc. 464, 55 Supp. 649.

Where a motion is made to punish several defendants for a civil contempt in willfully disobeying an injunction order directed to and issued against all the defendants proceeded against, and an order adjudging them guilty of such contempt does not state the actual loss or injury of the plaintiff, nor any items from which the amount thereof may be computed or inferred, under subdivision 2 of section 2284 of the Code of Civil Procedure, a single fine of \$250 may be imposed upon all of the defendants served in the proceeding, for which each defendant is severally liable, and in default any one and all are liable to imprisonment, but one payment is a satisfaction as to all. *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 164 N. Y. 473, modif'g 51 App. Div. 579, 64 Supp. 930.

A member of the municipal assembly, having on the day he is served with an order to show cause why he should not be punished for contempt in failing to obey a writ of peremptory mandamus, and before any decision or final order, complied with the writ in voting for an issue of corporate stock, the court has not power to imprison him under the Code of Civil Procedure, section 2285, in addition to requiring him to pay the expenses of the proceeding. *People ex rel. Peirce v. Brice*, 62 App. Div. 593, 71 Supp. 196, modif'g and aff'g 34 Misc. 491, 70 Supp. 346.

An order adjudging a person guilty of contempt and commanding him to pay a fine for a certain amount and providing that he be committed to jail unless he pays said fine, together with the sheriff's fees, should be modified by striking therefrom the provision as to the sheriff's fees, where it appears that the amount of such fees was not fixed by the order nor made a part of the fine. *Maigille v. Leonard*, 102 App. Div. 367, 92 Supp. 656; aff'd, 181 N. Y. 558.

If the judgment debtor is guilty of contempt and the proceedings to punish him are regular, the imposition of a nominal fine is not authorized. *Mitchell v. Loderman*, 97 Supp. 1006.

Where, subsequent to an adjudication of contempt for violation of an injunction, the defendant undertakes to comply with the conditions, the measure of damage is to be determined by the condition of affairs existing at the time of the hearing before the referee. *Ray v. N. Y. Bay Extension R. R. Co.*, 48 App. Div. 502, 62 Supp. 924.

Where an order is made punishing a contempt by a fine only, a subsequent order striking out an answer as an additional punishment must rest on a new contempt. *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 54 App. Div. 241, 66 Supp. 607.

A commitment for contempt in refusing to perform an act still in the power of the offender may, under section 2284 of the Code of Civil Procedure, limit the punishment to the payment of a fine. *Hommel v. Buttling*, 46 App. Div. 206, 61 Supp. 811.

The court has power to strike out the answer of a defendant as a punishment for his contempt of court. *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 51 App. Div. 583, 64 Supp. 933.

Section 111 of the Code, limiting the duration of imprisonment under civil process, applies only to process after final judgment, and does not preclude the court from committing a defendant for contempt in failing to pay alimony awarded by the final judgment, because he had been imprisoned for three months for contempt in refusing to pay alimony under an interlocutory order. *Reese v. Reese*, 46 App. Div. 156, 61 Supp. 760, aff'g 29 Misc. 249, 60 Supp. 406.

Failure to comply with an order directing the relator to support his mother, made under the Code of Criminal Procedure, section 915, is a civil and not a criminal contempt, for which imprisonment for more than thirty days may be required. *People ex rel. Kroncke v. O'Brien*, 39 Misc. 110, 78 Supp. 904.

A fine of \$300 for contempt of court is unauthorized where the moving papers merely show a default in payment of \$200. So, to, it is improper to include motion costs in the fine. *Guerrier v. Coleman*, 135 App. Div. 46, 119 Supp. 895.

The court is not authorized to impose upon a judgment debtor, who failed to appear for examination in supplementary proceedings, a fine in the amount of the judgment in the absence of proof of any loss or injury to the judgment debtor. *Ross v. La Cagnina*, 68 Misc. 497, 124 Supp. 753.

Upon a reference on a motion to vacate a judgment on the ground of non-service of process, where the question of service has been determined adversely to the defendant, the court has no power to allow the plaintiff a counsel fee of \$75, or to provide in the order that, if defendant fails to pay the amount directed to be paid by the order, he shall be adjudged guilty of contempt of court. *Karon v. Eisen*, 72 Misc. 12.

Where, on a motion to vacate a judgment by default upon the ground that defendant had never been served with the summons and complaint, the matter is sent to a referee whose report that defendant had been properly served was confirmed, and it appears that there were twelve full hearings at which over 500 pages of testimony were taken and that the referee took twelve days in reading the same and preparing his report, a charge of \$500 for referee's fees, \$420 for stenographer's fees and \$10 motion costs is not excessive.

The attorney for the plaintiff, for services rendered before the referee and upon a motion to punish the defendant for contempt in procuring by perjury and deceit orders from the court impairing, impeding, and prejudicing plaintiff's rights and remedies and in causing him actual injury and expenses incurred to resist said orders, may be allowed \$1,000 asked for; it appearing upon an examination of the papers used upon the motion that for the services performed the charge was fair and reasonable. *Dollard v. Koronsky*, 61 Misc. 392, 113 Supp. 793.

ARTICLE VIII.

MISCELLANEOUS PROVISIONS. Judiciary Law, §§ 775, 776, 777, 778, 779, 780.

§ 775. *When court may release offender, 773.*

§ 776. *Offender liable to indictment, 773.*

§ 777. *Proceedings when accused does not appear, 773.*

§ 778. *Prosecution of undertaking by person aggrieved, 773.*

§ 779. *Prosecution of undertaking by attorney-general or district attorney, 774.*

§ 780. *Sheriff liable for taking insufficient sureties, 774.*

§ 775. **When court may release offender.**

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where, the commitment was made as prescribed in section twenty-four hundred and fifty-seven of the code of civil procedure, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment. (Code Civ. Pro., § 2286.)

§ 776. **Offender liable to indictment.**

A person, punished as prescribed in this article, may, notwithstanding, be indicted for the same misconduct, if it is an indictable offense; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment. (Code Civ. Pro., § 2287.)

§ 777. **Proceedings when accused does not appear.**

Where a person, arrested by virtue of a warrant of attachment, has given an undertaking for his appearance, as prescribed in this article and fails to appear, on the return day of the warrant, the court may either issue another warrant, or make an order, directing the undertaking to be prosecuted; or both. (Code Civ. Pro., § 2288.)

§ 778. **Prosecution of undertaking by person aggrieved.**

The order directing the undertaking to be prosecuted, may, in the discretion of the court, direct the prosecution thereof, by and in the name of any party aggrieved by the misconduct of the accused. In such a case, the plaintiff may recover damages, to the extent of the loss or injury sustained by him, by reason of the misconduct, together

with the costs and expenses of prosecuting the special proceeding in which the warrant was issued; not exceeding the sum specified in the undertaking. (Code Civ. Pro., § 2289.)

§ 779. Prosecution of undertaking by attorney-general or district attorney.

If no party is aggrieved by the misconduct of the accused, the order must, and, in any case where the court thinks proper so to direct, it may, direct the prosecution of the undertaking, by the attorney-general, or by the district attorney of the county in which it was given, in the name of the people. In an action, brought pursuant to the order, the people are entitled to recover the entire sum, specified in the undertaking. Out of the money collected, the court, which directed the prosecution, must direct that the person, at whose instance the warrant was issued, be paid such a sum as it thinks proper, to satisfy the costs and expenses incurred by him, and to compensate him for any loss or injury sustained by him, by reason of the misconduct. The residue of the money must be paid into the treasury of the state. (Code Civ. Pro., § 2290.)

§ 780. Sheriff liable for taking insufficient sureties.

After the return of an execution, issued upon a judgment, rendered in an action upon the undertaking, an action, to recover the amount of the judgment, may be maintained against the sheriff, where it appears that, at the time when the undertaking was given, the sureties were insufficient, and the sheriff had reasonable ground to doubt their sufficiency. Such an action may be maintained by the plaintiff, in whose favor the judgment was recovered. If the people were plaintiffs, the action must be prosecuted by the attorney-general or the district attorney; and any money collected therein must be disposed of, as prescribed in the last section. (Code Civ. Pro., § 2291.)

Where a party has been arrested upon an attachment for a contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and is adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offense. Where the defendant in such a proceeding has not appeared at all, and the bond has been prosecuted in pursuance of such an order, the court may still allow him to appear upon terms at a future term, and answer interrogatories to be filed touching the contempt. *Barton v. Butts*, 32 How. 456, citing *People v. Munro*, 15 How. 494.

Provision may be made by statute for the recovery in a civil action of a penalty and for an indictment against the party for the same offense, and the recovery of the penalty does not bar the criminal punishment. *People ex rel. Garbutt v. R. & S. L. R. R. Co.*, 76 N. Y. 294; dist'd and explained, *People v. Meakin*, 133 N. Y. 214.

The application for a favor, by a party in contempt, will not be granted until he purges himself of the contempt. *Johnson v. Pinney*, 1 Paige, 646; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366; *Rogers v. Paterson*, 4 Paige, 450. Nor can the party in contempt apply to the court to take any aggressive steps, but he may appeal or move to set aside the order adjudging him in contempt; those are adjudging matters of right. *Matter of Steinert*, 24 Hun, 246; *Brinkley v. Brinkley*, 47 N. Y. 40. A resi-

dent of the State, who, in disobedience of a decree in divorce rendered against him on the ground of adultery, which prohibits him from marrying again during the life of the divorced wife, goes to another State and there contracts another marriage, immediately returning to this State to live, cannot, while in such contempt, be permitted to prosecute an action against his second wife for divorce on the ground of adultery. *Marshall v. Marshall*, 2 Hun, 238.

A person committed for contempt for non-payment of moneys, as ordered by the court, is not entitled to the jail liberties on giving the usual bond. *People v. Bennett*, 4 Paige, 103; *People v. Rogers*, 2 Paige, 103; *People v. Cowles*, 4 Keyes, 38; *Eagan v. Lynch*, 3 Civ. Pro. 236; *Clark v. Clark*, 2 Law Bull. 211; *Matter of Clark*, 20 Hun, 551. *Contra*, *Ward v. Ward*, 6 Abb. N. S. 79; appeal dism'd, 81 N. Y. 638.

Where a judgment debtor, on being arrested on an attachment, at once submits himself to examination, the court will ordinarily accept his excuse and discharge him from arrest, but not where the debtor puts the creditor to expense, and raises all possible objections. *Hilton v. Patterson*, 18 Abb. 245. It was said in *Lansing v. Easton*, 7 Paige, 364, that there was no way in which a defendant imprisoned for a fine could be released, except by consent of the prosecutor, until payment of the fine. This was before the statute of 1843. The application to be discharged must be on notice to the adverse party. *Strobridge v. Strobridge*, 21 Hun, 288. Where the inability appears to be willful, the party will not be discharged. *Lansing v. Lansing*, 41 How. 248. Where, on an application to be discharged for inability to pay, the affidavit denied the contempt for which he was committed, it was held that as he denied a fact which had been adjudicated against him, he could not be believed as to the other statements, and the application was denied. *Palmer v. Kelly*, 4 Sandf. Ch. 575. An attorney who had been confined in jail upward of three months, for non-payment of a fine imposed for contempt, applied to be released because of inability to pay; under the circumstances, it appearing he had given bail for \$1,000 on his arrest, the order discharging him was reversed, unless he would give a bond for payment of the fine. *Matter of Steinert*, 29 Hun, 301. The expression "unable to endure the imprisonment" contemplates something in the nature of a slow wasting, a steady diminution of the vital forces, tending unless arrested by sunlight, open air, etc., to a complete destruction of the constitution; it does not apply to malarial fever. *Moore v. McMahon*, 20 Hun, 44. In *Mitchell v. Hall*, 3 Law Bull. 23, it is questioned whether power to relieve the defendant is given solely to the court out of which the process issued, when commitment was made under section 2457 of the Code.

Application for release by an administrator, imprisoned for having failed to comply with a surrogate's decree to pay a sum of money equal

to his waste of the estate, made under the Code of Civil Procedure, section 2286, upon his own unsupported statement that he was unable to make the payment, he having fled from the jurisdiction at the time of default and being shown to have been chargeable with fraud and perjury, denied, the fact that he had been adjudicated a bankrupt not being pertinent. *Matter of Collins*, 39 Misc. 753, 80 Supp. 1119.

ARTICLE IX.

APPEAL.

An appeal can only be taken from a final order in contempt proceedings and not from a conditional order. *Greite v. Heinrichs*, 53 St. Rep. 851, 71 Hun, 11, 24 Supp. 546. See 7 St. Rep. 133.

The Appellate Division has no power to review an order made by a Surrogate's Court denying a motion to vacate an order punishing a person for contempt in failing to obey a former final order and decree of the same court, and removing him as an executor of an estate. *Matter of Pye*, 23 App. Div. 206; *sub nom.*, *Van Houten v. Pye*, 48 Supp. 865, 82 St. Rep. 865.

While punishment for contempt rests in a measure upon discretion, it is a judicial discretion, and refusal to exercise it is reviewable on appeal. *Brown v. Braunstein*, 86 App. Div. 499, 83 Supp. 798.

Where no fine was imposed on defendant by way of punishment, but wholly for the purpose of indemnity, the General Term could not reduce the fine to an amount which, under section 2284, could be imposed by way of punishment for defendant's misconduct, it having been imposed originally under this section. *Fall Brook Co. v. Heckscher*, 4 St. Rep. 657.

In *Snyder v. Van Ingen*, 9 Hun, 569, an appeal to the General Term was sustained where a party had been discharged from imprisonment for contempt on habeas corpus, and he was again brought before the judge, retried, and more severe penalties imposed. An appeal may be taken from the final order; it is not necessary that a commitment issue. *People v. Donohue*, 59 How. 417.

The court on appeal has the power, in an appropriate case, to make a reduction in the amount of a fine imposed on a person for contempt. *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. L. Co.*, 68 App. Div. 414, 74 Supp. 486; *Fitzgerald v. Moffett*, 68 App. Div. 414, 74 Supp. 486.

A proper method of reviewing a ruling adjudging a party guilty of criminal contempt is by a writ of certiorari, and not by an appeal from an order declaring the party guilty of such a contempt or by an appeal from an order declining to vacate such order. *Matter of Teitelbaum*, 84 App. Div. 351, 82 Supp. 887.

As a general rule, the propriety of a commitment is not examinable by another court than the one by which it was awarded, but this is subject to the qualification that the conduct charged as constituting the contempt was such that some degree of delinquency or misbehavior can be predicated of it, for if the act is plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it does not become a contempt by being so adjudged. *Matter of Hackley*, 24 N. Y. 74. See *Mitchell's Case*, 12 Abb. 249. An order punishing for contempt in violation of an injunction can only be reviewed upon the merits, or for alleged legal error on appeal from the final order adjudging the contempt. *Watrous v. Kearney*, 79 N. Y. 496; reported below, 11 Hun, 584. Such a motion may be made when previous order was by default. *Tinkey v. Langdon*, 60 How. 180. Where an answer has been stricken out, the remedy is by application to the court to be let in. *Walker v. Walker*, 82 N. Y. 260. As to the right of appeal from a final order adjudging a party in contempt, see, also, *McCredie v. Senior*, 4 Paige, 378; *People v. Spaulding*, 10 Paige, 284, 7 Hill, 302; *Forbes v. Willard*, 37 How. 193; *People v. Healey*, 48 Barb. 564; *People v. Sturtevant*, 9 N. Y. 263; *Livingston v. Swift*, 23 How. 1; *Brinkley v. Brinkley*, 47 N. Y. 40; *Sudlow v. Knox*, 7 Abb. Pr. N. S. 411; *Carrington v. Fonda Ry. Co.*, 52 N. Y. 583.

Punishment for contempt is a matter which rests largely in the discretion of the court having immediate jurisdiction of the parties, and a strong case must be presented before an appellate court will be justified in reversing an order refusing to punish a party for contempt. *Herrmann v. Herrmann*, 82 App. Div. 437, 81 Supp. 811.

It is held, in *Matter of Dissosway*, 91 N. Y. 235, that an appeal was properly taken from a decision of a Surrogate's Court refusing to adjudge a party in contempt and affirming the decree appealed from.

A proceeding to punish a party for contempt instituted by an order to show cause to enforce a judgment in an action is not a special proceeding, but a proceeding in an action, and is, therefore, not appealable to the Court of Appeals. *Jewellers' Mercantile Agency v. Rothschild*, 155 N. Y. 255.

A proceeding to punish defendant for contempt to enforce a civil remedy instituted by an order to show cause is a proceeding in an action and not a special proceeding; an order made therein, even if final, not being made in a special proceeding, is not appealable as of right to the Court of Appeals. Where an order adjudging defendant guilty of contempt and imposing a fine also contains provisions for a reference to take proof and report as to the damages sustained by the plaintiff by the acts and misconduct of the defendant, it is an interlocutory and not a final

order, and consequently not appealable as such. *Ray v. N. Y. Bay Extension Bay Co.*, 155 N. Y. 103, dism'g appeal from 20 App. Div. 539; *Jewellers' Mercantile Agency v. Rothschild*, 155 N. Y. 255.

An order punishing a witness for contempt in refusing to disclose information which was not privileged is a final order reviewable by the Court of Appeals. *Matter of King v. Ashley*, 179 N. Y. 281, aff'g 96 App. Div. 143.

Proceedings taken under section 915 of the Code of Civil Procedure to punish a witness for contempt in failing to give testimony for use in another State constitute a special proceeding; and the final order therein from which an appeal will lie to the Court of Appeals as a matter of right is that which punishes or refuses to punish the witness; no appeal will lie from an order which merely directs the witness to answer specified questions and is, therefore, interlocutory in its character, and an appeal therefrom must be dismissed. *Matter of Strong v. Randall*, 177 N. Y. 400.

A railroad which fails to obey a judgment requiring it either to remove an obstruction or to condemn land cannot dispute the validity of the former mandate of the court upon an appeal from an order imposing a fine entered in subsequent proceedings for contempt taken by the owner of the premises. *Ray v. N. Y. Bay Extension R. R. Co.*, 20 App. Div. 539, 47 Supp. 301.

A defendant who, by an interlocutory judgment, has been ordered to transfer and deliver to plaintiffs certain stock and bonds, which, by stipulation of parties, have been deposited with a trust company, to be held subject to the order of the court, and who intends to appeal from the final judgment thereon, should not be adjudged to be in contempt of court for failing so to deliver the stock. The defendant has a right to review the interlocutory judgment on an appeal from the final judgment. *Potter v. Rossiter*, 109 App. Div. 32, 95 Supp. 1037.

On appeal from an order confirming the report of a referee, adjudging the defendant guilty of a contempt of court in the violation of an injunction order forbidding him to trespass on plaintiff's land, the Appellate Division cannot determine that the evidence does not establish such violation, where it appears that the referee, with the consent of both parties, made a special inspection of the premises. *Braisted v. Brooklyn & R. B. R. Co.*, 46 App. Div. 204, 61 Supp. 674.

ARTICLE X.

LEGISLATIVE CONTEMPTS. § 4, Legislative Law.

The matter of legislative contempts, while not strictly within the scope of a work on special proceedings, seems germane to the subject, since the

right of the Legislature to punish for contempt very frequently comes before the courts for examination. In the examination of questions of contempt, legislative as well as judicial, the practitioner will look for a collation of the authorities under the statute applicable to punishment therefor. The statute, therefore, with leading decisions on the subject is here given.

§ 4, Legislative law. Contempts of either house.

Each house may punish by imprisonment not extending beyond the same session of the legislature, as for a contempt, for the following offences only:

1. Arresting a member or officer of either house in violation of his privilege from arrest;
2. Disorderly conduct of its members, officers, or others in the immediate view and presence of the house, tending to interrupt its proceedings;
3. The publication of a false and malicious report of its proceedings, or of the conduct of a member in his legislative capacity;
4. Giving or offering a bribe to a member, or attempting, by menace, or other corrupt means, directly or indirectly, to influence a member in giving or withholding his vote, or in not attending meetings of the house of which he is a member;
5. Neglect to attend or to be examined as a witness before the house or committee thereof, or upon reasonable notice to produce any material books, papers, or documents, when duly required to give testimony or to produce such books, papers or documents in a legislative proceeding, inquiry or investigation.

The matter of legislative contempts is very thoroughly considered and fully discussed in opinion of Rapallo, J., concurred in by the entire court, in *People ex rel. McDonald v. Keeler*, 99 N. Y. 480, where the question arose upon habeas corpus as to the power of the Legislature to punish for contempt. It is said that the five enumerated offenses are the only ones which either House is authorized to punish as contempts, and that they take the place of the numerous offenses and acts which were treated by Parliament as contempts. Reference is made to *Kilbourn v. Thompson*, 103 U. S. 168, where the plaintiff had been convicted of contempt, and sentenced by the House of Representatives to imprisonment. There it was held that the right of the House of Representatives to punish a citizen for a contempt was derived solely from the Federal Constitution; and that such rights as were not conferred by that instrument were reserved to the States respectively, or to the people; and that while the House had power to punish contempt by fine and imprisonment in certain cases, it had no general jurisdiction on the subject.

It is further held that throughout the Union the practice of legislative bodies, and in this State the statutes existing at the time the Constitution was adopted, afford strong arguments in favor of the recognition of the right of either House to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which the State Legislature has authority to regulate and enforce by statute. *Kilbourn v. Thompson* is distinguished in 99 N. Y. 476. That case is cited in *Re Chapman*, 166

U. S. 661, where it is held that the refusal to answer pertinent questions in the matter of inquiry within the jurisdiction of the Senate constitutes a contempt of that body.

The general rule is further laid down that indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts. In *People ex rel. Subold v. Webb*, 5 Supp. 855, 23 St. Rep. 324, it was held that the Legislature of this State does not possess the common-law power to punish for contempt which is exercised by the English Parliament; it has only such powers in that respect as are expressly conferred upon it. And where a committee was appointed to take evidence and report to the House "such recommendations as in its judgment the public interests may require, and for the purpose of remedial legislation," it was held that the knowledge acquired by the investigations could not be used for the purpose of legislation within the meaning of the statute relating to contempt, and that the Legislature had no power to punish the witness for contempt in refusing to testify before the committee. The case of *People v. Sharp*, 107 N. Y. 427, considers very fully the subject of contempt of legislative committees, and holds that notwithstanding the vesting of the judicial power in the courts, certain powers, in their nature judicial, may be delegated to a committee, with power to take testimony, summon witnesses, and a refusal to appear and testify before such committee in obedience to a subpoena is a contempt.

ARTICLE XI.

PRECEDENTS RELATING TO CIVIL AND CRIMINAL CONTEMPTS.

Precedents in Proceeding to Punish Members of Labor Union for Disobedience of Injunction (*People ex rel. Stearns v. Marr*, 181 N. Y. 463).

Order to Show Cause why Defendants Should not be Punished for a Contempt.

SUPREME COURT — COUNTY OF ONONDAGA.

EDWARD C. STEARNS, AVIS VAN WAGENEN AND HERBERT E. MASLIN,

vs.

WILLIAM MARR, AS PRESIDENT OF THE IRON MOLDERS' UNION, No. 80, AND OTHERS.

Upon reading and filing the annexed affidavits of Edgar F. Brown, duly verified upon the 7th day of July, 1903, and the two several affidavits of James Matera, each duly verified upon the 3d day of July, 1903, the affidavits of Irving J. Higbee, of Ludwig Warner, Albert Thurston, Ernest Seib and Carl Seib, each duly verified upon the 6th day of July, 1903, and the affidavits of Fred Thompson, George Thompson, Will Slegel and Albert Thurston, each

duly verified upon the 3d day of July, 1903, and the affidavits of Albert Thurston, duly verified upon the 26th day of June, 1903, and of William Hurst, duly verified upon the 3d day of July, 1903, whereby it is made to appear that one Michael Strozik, a member of the Iron Molders' Union, No. 80, with knowledge of the injunction order herein and with the intent and for the purpose of frightening and intimidating the workmen then employed and who might thereafter be employed by plaintiffs' and in violation and disobedience of said injunction order, did, upon the 25th day of June, 1903, strike, maltreat and assault with his fist and with a brick or stone one Jim Meter, an employee of plaintiffs herein.

And that the said Michael Strozik, with like knowledge and intent and in disobedience of said injunction order, did, upon the 1st day of July, 1903, strike, assault and intimidate one Fred Thompson, an employee of plaintiffs herein.

And that the said Michael Strozik, with like knowledge and intent, and in disobedience of said injunction order, did, upon the 2d day of July, 1903, push and assault and intimidate one Ludwig Warner, an employee of said plaintiffs herein.

And that one Jack Powers, a member of said Iron Molders' Union, No. 80, with knowledge of the injunction order herein, and with the intent and for the purpose of frightening and intimidating the said Thurston, and the workmen then employed or who might be employed by plaintiffs, and in violation and disobedience of said injunction order, did upon the 26th day of June, 1903, assault the said Albert Thurston by laying violent hands upon the said Thurston and detaining him against his, the said Thurston's, resistance, and upon the said day did menace, threaten and intimidate the said Thurston by saying, to the said Thurston, "Now you get out of here, and don't come back again; if you do you will get your God-damned block knocked off."

And that one John Lillis, a member of the Iron Molders' Union, No. 80, and a defendant in this action, with knowledge of said injunction order, and for the purpose of and with the intent of intimidating the said Albert Thurston and one Ernest Seib, employees of plaintiffs, and other workmen of plaintiffs, then employed or who might thereafter be employed by plaintiffs, and in violation and disobedience of said injunction order, did, upon the 3d day of July, 1903, direct, aid, encourage, assist and abet certain persons, fellow workmen and members of the Iron Molders' Union, No. 80, in assaulting and striking, kicking, beating and intimidating said Albert Thurston and the said Ernest Seib by being present when said acts of violence and intimidation were committed, and by shouting just beforehand, "Now is your time," to those committing the said assaults and acts of violence.

And that one Adam Benz, a member of said Iron Molders' Union, No. 80, with knowledge of said injunction order, and for the purpose and with the intent of frightening and intimidating the said Warner, and other workmen, then employed or thereafter to be employed by plaintiffs herein, and in disobedience and in violation of said injunction order, did, upon the 3d day of July, 1903, threaten, frighten and intimidate the said Ludwig Warner, an employee of plaintiffs, by following the said Warner from his work, and telling him that the strikers, of which he, the said Benz, was one, would kill him, the said Warner, if he returned to work in the foundry of plaintiffs, and that he would go to the said Warner's house that night to see the said Warner.

And that the Iron Moulders' Union, No. 80, in disobedience and violation of the said injunction order, has done and has permitted and suffered to be done the assaults and acts of violence and of intimidation done and committed by its members, and each and every of its members as set forth in the affidavits hereinbefore referred to.

And the said union, by its agent, servant and member, one Ed. Merefelter and others, members of said union, did frighten, menace and intimidate the said Albert Thurston, an employee of plaintiffs, and other workmen of plaintiffs as set forth in the affidavit of said Thurston, heretofore referred to.

And that the said union, in violation and disobedience of said injunction order, did, upon the 3d day of July, 1903, by its members, agents, servants and representatives, strike, beat, kick, assault and intimidate said Albert Thurston and the said Ernest Seib, employees of plaintiffs.

And that said union, in violation and disobedience of said injunction order, did upon the 3d day of July, 1903, by certain of its members, agents, representatives and servants, assault and intimidate the said William Hurst, an employee of plaintiffs, by throwing the said Hurst from his bicycle while on the way to work in plaintiffs' employ, and by telling the said William Hurst to turn right around and go home, and if caught at the factory again they would make it damned good and hot for him.

And that the Iron Moulders' Union, No. 80, in violation and disobedience of said injunction, did, upon the 2d day of July, 1903, and upon the 3d day of July, 1903, by members of said union, assemble near and about the factory of plaintiffs herein, thereby intimidating the workmen of E. C. Stearns & Co.

I do hereby order and require that the said Iron Molders' Union, No. 80, the said Jack Powers, John Lillis, Michael Strozik, Adam Benz and each of them, show cause before me at a Special Term of the Supreme Court, to be held at the courthouse in the city of Syracuse, N. Y., upon the 11th day of July, 1903, at ten o'clock in the forenoon of said day, why the said Iron Molders' Union, No. 80, and said persons and each of them should not be punished for said alleged offenses, and

I do hereby further order that a copy of the affidavits upon which this order is granted and of this order be served upon the Iron Molders' Union, No. 80, and upon each of said persons in this order named, on or before the 8th day of July, 1903.

W. S. ANDREWS,

Dated, July 7, 1903.

Justice Supreme Court.

(Same title.)

STATE OF NEW YORK,	} ss.:
COUNTY OF ONONDAGA,	
City of Syracuse,	

Edgar F. Brown, being duly sworn, deposes and says, that he is the attorney for the plaintiffs in the above-entitled action; that this action was commenced by the service of the summons and complaint upon the defendants, William Marr, as president of the Iron Molders' Union, No. 80, Jerry Shea, John Clune, John Lillis, Peter Hammond, Edward Mouske and Frank Ford, personally within the State, and was brought for an injunction restraining the said defendants from the commission of the acts hereinafter mentioned, and an order was duly made in said action upon the 19th day of June, 1903, by Hon. William S. Andrews, justice of the Supreme Court, and was duly served upon the defendants, who were served with said summons and complaint, which said order enjoined and restrained said defendants, and each of them, the Iron Molders' Union, No. 80, its members, servants, agents, representatives and accessories and each and every individual defendant, his agents, servants, representatives and accessories, from assaulting, menacing, threatening and intimidating, whether by manner, attitude, numbers, speech or other act or means, the men or workmen in plaintiffs' employ or coming to plaintiffs for employment, and from interfering with said plaintiffs' workmen or said plaintiffs' business by any unlawful means, for the purpose of preventing any person or persons who now are or hereafter might be in

plaintiffs' employment from continuing therein or being desirous of entering it, from doing so, or continuing therein, and said injunction order has since been and is still in full force and effect.

That the defendants, the Iron Molders' Union, No. 80, and its members, have disobeyed and violated said injunction, a copy of which is hereto annexed, whereby the rights and remedies of the plaintiffs in said action have been impaired, impeded and prejudiced, as appears by the affidavits hereto annexed.

That no previous application has been made for an order herein.

(Jurat.)

EDGAR F. BROWN.

Copy of Injunction.

(Caption and title.)

An order to show cause why an injunction should not be granted herein restraining the defendant, the Iron Molders' Union, No. 80, and its members, and said defendants and each of them, their agents, servants, representatives and accessories, and all persons in any way connected with them, or either of them, from the commission of the acts mentioned and set forth in plaintiffs' complaint herein and from assaulting, menacing, threatening and intimidating, whether by manner, attitude, numbers, speech, or other act or means, the men and workmen in plaintiffs' employ, or who come to plaintiffs for employment, and from interfering with said plaintiffs' workmen, or said plaintiffs' business by any unlawful means for the purpose of preventing any person or persons who are now or may hereafter be in plaintiffs' employment, from continuing therein, or who, being desirous or entering the same, from entering it, and continuing therein, having been granted by the Hon. W. S. Andrews, justice of the Supreme Court, upon the 19th day of June, 1903, and so enjoining and restraining said defendants and each of them until the hearing and determining of said motion, and said matter having come on to be heard upon the 30th day of June, 1903,

Now, upon reading and filing the order to show cause herein, dated the 19th day of June, 1903, and the affidavits upon which said order to show cause was made and granted, and upon reading and filing the affidavits of William Marr, Frank H. Ford, Martin J. Hughes, James B. Hogan, Michael Daley, August Unkauf, Jacob Wohleber, John Lillis, John Clune and Jerry Shea, in opposition thereto, and after hearing Edgar F. Brown, Esq., of counsel for plaintiffs in support of said motion, and Theodore E. Hancock, Esq., of counsel for the Iron Molders' Union, No. 80, and Dennis B. Keeler, Esq., of counsel for the defendants Jerry Shea, John Clune, Frank H. Ford, Clarence Millard, Peter Hammond, John Lillis and Edward Mouske in opposition thereto.

Ordered, that the Iron Molders' Union, No. 80, its each and every member, and said defendants, and each of them, their agents, servants, representatives and coadjutors, and all persons connected with them, or either of them, be and they are hereby enjoined and restrained from assaulting, menacing, threatening or intimidating, whether by manner, attitude, speech, numbers or other act or means the men and workmen in plaintiffs' employ, or who come to plaintiffs for employment, and from interfering with said plaintiffs, or said plaintiffs' business, by any unlawful means for the purpose of preventing any person or persons who now are or may hereafter be in plaintiffs' employment, from continuing therein, or who being desirous of entering said employment, from doing so, or continuing therein.

Enter:

W. S. ANDREWS,
Justice Supreme Court.

Order Appointing Referee to Take Proof of the Facts and Report the Same to the Court.
(Caption and title.)

(Recitals.)

Ordered, that said proceedings as to the Iron Molders' Union, No. 80, be and the same are hereby dismissed with ten dollars (\$10) costs, and it is further

Ordered and directed, that William G. Tracey, of Syracuse, N. Y., be and he is hereby appointed a referee to hear and to take the evidence of the parties to these proceedings and their witnesses, and to make his report to this court with his opinion thereon on or before the 18th day of July, 1903.

Order Adjudging Defendants Guilty of Contempt of Court and Directing Their Punishment.
(Caption and title.)

An order having been made upon the 7th day of July, 1903, that William Marr, as president of the Iron Molders' Union, No. 80, and John Lillis, the defendants above named, and Jack Powers, Michael Strozik and Adam Benz, show cause why they and each of them should not be punished for contempt of court in willfully disobeying the order of injunction made by the Hon. William S. Andrews, a justice of the Supreme Court, upon the 19th day of June, 1903, in a certain action then pending in the Supreme Court of the State of New York, wherein Edward C. Stearns, Avis Van Wagenen and Herbert E. Maslin were plaintiffs, and the said William Marr, as president of the Iron Molders' Union, No. 80, and others, above named, were defendants, and said motion having upon the 11th day of July, 1903, come on to be heard at a Special Term of the Supreme Court held at the courthouse in the city of Syracuse, N. Y., and having been then dismissed as to the Iron Molders' Union, No. 80, and referred to William G. Tracey, Esq., a counsellor-at-law of Syracuse, N. Y., to hear and take the evidence of the parties to said proceedings, and their witnesses, and to make his report to this court with his opinion thereon, as to the charges and allegations in said proceedings against the said Jack Powers, John Lillis, Michael Strozik and Adam Benz, and the said referee, pursuant to said order, having heard said parties and their witnesses, and having made his report to this court, with his opinion thereon,

Now, upon reading and filing the preliminary injunction order herein dated the 19th day of June, 1903, and the order to show cause in the contempt proceedings herein, dated the 7th day of July, 1903, together with the affidavits of (insert names of parties making affidavits), upon which foregoing said affidavits and all of them, the said order to show cause of July 7, 1903, was issued, and the affidavits of (insert names), in opposition to said motion, the order of reference herein dated the 11th day of July, 1903, the stenographer's minutes before said referee, and said referee's report, and upon motion of Edgar F. Brown, Esq., of counsel for plaintiffs, and after hearing Dennis B. Keeler, Esq., and Theodore E. Hancock, Esq., of counsel for said Benz, Powers, Strozik and Lillis, it is

Ordered, that the report of said referee be and the same is hereby confirmed, and it is further

Ordered, adjudged and decreed, that the said Michael Strozik is not guilty of a contempt of court herein, and as to the said Michael Strozik these proceedings are dismissed, with ten dollars (\$10) costs.

That the said Jack Powers, whose true name is Kyran Powers, is guilty of a criminal contempt of court, and has willfully disobeyed said injunction order in that, with knowledge of the existence of said injunction and its terms, and for the purpose of intimidating and preventing one Albert Thurston, who was an employee of the plaintiffs, from continuing in the employ of plaintiffs, the said Kyran Powers did, upon the 26th day of June, 1903, take hold of the

said Thurston and say to him, "If you come back here again you will get your punching;" and in that, with knowledge of the said injunction and its terms, and for the purpose of intimidating the said Thurston, and of preventing him from continuing in the employ of plaintiffs, the said Kyran Powers did, upon the 3d day of July, 1903, stop the said Thurston, while said Thurston was going to work in plaintiffs' factory, and say to the said Thurston, "Haven't you got any more principle than to work there; if you go down there to work you will get your God-damned head plunked; you keep out of here;" and in that, with knowledge of said injunction order and its terms, and for the purpose of intimidating and preventing the said Thurston and one Ernest Seib, who were in the employ of the plaintiffs, from continuing in such employment, the said Kyran Powers did, upon the 3d day of July, 1903, incite a gang of men to attack the said Thurston and the said Seib by being present and shouting, "Slug him one;" and that thereupon, in pursuance to said incitement, the said Thurston and Seib were attacked and injured.

And the said John Lillis is guilty of a criminal contempt of court, and has willfully disobeyed said injunction order, in that, with knowledge of said injunction and its terms and for the purpose of intimidating one Albert Thurston and one Ernest Seib, employees of plaintiffs, and of preventing the said Thurston and the said Seib from continuing in plaintiffs' employ, the said John Lillis did, upon the 3d day of July, 1903, incite a gang of men to attack said Thurston and the said Seib, by being present and shouting, "Now is your time," and that thereupon and in pursuance to such incitement, the said Thurston and Seib were attacked and injured.

That the said Adam Benz, whose true and correct name is Otto Benz, is guilty of a criminal contempt of court, and has willfully disobeyed said injunction order, in that, with knowledge of the existence of said injunction and its terms, and for the purpose of intimidating one Ludwig Warner, an employee of plaintiffs, and of preventing the said Warner from continuing in the employ of plaintiffs, did upon the 2d day of July, 1903, go up to the said Warner, and say to him, as the said Warner was leaving plaintiffs' factory, "If you go into that shop again of E. C. Stearns, we will kill you," and it is further

Ordered and directed, that Kyran Powers be imprisoned for a period of thirty (30) days, in close custody in the common jail of the county of Onondaga, and that he be, and he is, hereby fined the sum of seventy-five dollars (\$75), and in case of default in the payment of the aforesaid fine, that he be imprisoned in close custody in the common jail of the county of Onondaga until said fine is fully paid, or for a period of thirty days after the expiration of the period of thirty days above mentioned shall have expired.

That the said John Lillis be imprisoned for a period of thirty days in close custody in the common jail of the county of Onondaga, and that he be, and he is hereby fined the sum of fifty dollars (\$50), and in case of default of the payment of the aforesaid fine, that he be imprisoned in close custody in the common jail in the county of Onondaga, until said fine is fully paid, or for a period of thirty days after the expiration of a period of thirty days above mentioned shall have expired.

That the said Adam Benz, whose true name is Otto Benz, be and he is hereby fined the sum of fifty dollars (\$50), and in case of default in the payment of the aforesaid fine, that he be imprisoned in close custody in the common jail in the county of Onondaga until said fine is fully paid, or for a period of thirty days, and it is hereby further

Ordered, that a warrant issue to carry into effect the provisions of this order.

Enter:

W. S. ANDREWS,
Justice Supreme Court.

Precedents in Proceeding to Punish Defendants for Contempt for Refusing to Comply, After Due Demand, with Judgment Directing Them to Pay Certain Sums and Turn Over Certain Property to a Receiver Duly Appointed by the Court. (General Electric Co. v. Sire, 88 App. Div. 498.)

Order to Show Cause to Punish Defendants for Contempts.

SUPREME COURT—COUNTY OF NEW YORK.

THE GENERAL ELECTRIC COMPANY,
SUING ON BEHALF OF ITSELF AND ALL
OTHER PARTIES SIMILARLY SITUATED WHO
SHALL COME IN AND CONTRIBUTE TO THE
EXPENSE OF THIS ACTION,

vs.

MEYER L. SIRE, HENRY B. SIRE AND
OTHERS.

(Recitals.)

Let the defendants Meyer L. Sire, Henry B. Sire, Leander S. Sire and William L. Stone, Jr., and each of them, show cause at a Special Term, Part I., of this court, to be held at the courthouse, in the city of New York, on the 19th day of February, 1903, at the opening of court upon said day or as soon thereafter as counsel can be heard, why they and each of them should not be adjudged guilty of contempt of this court and punished accordingly for having willfully disregarded, violated and treated with contempt the judgment entered in the action above entitled on the 25th day of July, 1902, by their refusal and neglect and their continued refusal and neglect to forthwith pay to the said defendant James R. Kiernan as permanent receiver of the defendant The Greater New York Amusement Company the sum of twenty-four thousand six hundred eighty-five dollars and fifty-seven cents (\$24,685.57), the aggregate of the payments made to the defendants Meyer L. Sire, Henry B. Sire and Leander S. Sire, and by their refusal and neglect and continued refusal and neglect to forthwith transfer to the receiver herein the furniture, fixtures, fittings and furnishings in and about the New York theater mentioned in resolution of December 28, 1899, and by their refusal and neglect and continued refusal and neglect in default of said transfer to pay to the said receiver the sum of nine thousand six hundred six dollars and seven cents (\$9,606.07), and by their refusal and neglect and continued refusal and neglect to forthwith deliver the scenery and costumes of the performance of "The Man in the Moon," and by their refusal and neglect and continued refusal and neglect in default of said transfer to pay to the said receiver the sum of five thousand dollars (\$5,000), the value thereof, and by their refusal and neglect and continued refusal and neglect forthwith to pay to the said James R. Kiernan, as receiver of the said Greater New York Amusement Company, the sum of nineteen thousand five hundred dollars (\$19,500), the value of the program contract between the defendant company and Frank V. Strauss & Co., transferred by resolution of December 28, 1899, and by their refusal and neglect and continued refusal and neglect to pay to said receiver the sum of eight hundred dollars (\$800), the value of the bar supplies transferred by resolution of May 4, 1900, from the defendant company herein to the Fifth Avenue Real Estate Company, and why such other and further relief should not be granted as to the court may seem just and proper.

Sufficient reason appearing to me, therefore, service of a copy of this order on or before the 14th day of February, 1903, upon the attorney for the said defendants, Albert I. Sire, will be sufficient notice of this motion.

Dated, New York, February 11, 1903.

VERNON M. DAVIS,

Justice of the Supreme Court of the State of New York.

Order Adjudging Defendants Guilty of Contempt.

(Caption and title.)

The plaintiff, the General Electric Company, Limited, having obtained a judgment against the defendants above named, dated the 27th day of June, 1902, filed in the office of the clerk of this court on the 25th day of July, 1902, and docketed in the said office on the 16th day of October, 1902, after the trial of the issues in the said action before Mr. Justice Alfred Steckler, at Special Term, Part IV., of this court, and it having been in the said judgment ordered, adjudged and decreed: (Herein insert matters adjudicated, upon failure to perform which, contempt proceedings were instituted.)

And an order to show cause having been thereafter duly granted herein directing the said defendants (naming them), and each of them, to show cause why they and each of them should not be adjudged guilty of contempt of this court and punished accordingly for having willfully disregarded, violated and treated with contempt the said judgment filed and docketed as aforesaid, by their and each of their refusal and neglect and their and each of their continued refusal and neglect to forthwith pay to the said defendant (Here insert facts as to refusal and neglect to comply with terms of judgment, with recital of papers upon which order is based) and due deliberation having been had, and it appearing to the satisfaction of the court that the said judgment, dated the 27th day of June, 1902, and filed in the office of the clerk of the Supreme Court on the 25th day of July, 1902, and docketed upon the 16th day of October, 1902, was duly personally served upon the said defendants (insert names) and that the said defendants and each of them have disregarded and disobeyed the said judgment whereby they were directed to pay over to the said receiver certain sums representing moneys and property transferred to them in fraud of creditors, in that the said defendants and each of them, to wit (naming them), have willfully disregarded, violated and treated with contempt the said judgment by their and each of their refusal and neglect and continued refusal and neglect to forthwith pay to the said defendant James R. Kiernan, as permanent receiver of the defendant The Greater New York Amusement Company, the sum of twenty-four thousand six hundred and eighty-five dollars and fifty-seven cents (\$24,685.57), the aggregate of the payments made to the said defendants (naming them) and to forthwith transfer to the said receiver the furniture, fixtures, fittings and furnishings in and about the New York theater mentioned in a certain resolution of December 28, 1899, or in default of said transfer to pay to the said receiver the sum of nine thousand six hundred and six dollars and seven cents (\$9,606.07), the value thereof, and in that the said defendants and each of them refused and neglected and continues to refuse and neglect to forthwith deliver the scenery and costumes of the performance of "The Man in the Moon," or in default of said transfer to pay to the said receiver the sum of five thousand dollars (\$5,000), the value thereof, and in that the said defendants and each of them refused and neglected and continued to refuse and neglect forthwith to pay said James R. Kiernan, as receiver of the Greater New York Amusement Company, the sum of nineteen thousand five hundred dollars (\$19,500), the value of the program contract between the said defendant company and Frank V. Strauss & Co., transferred by a certain resolution of December 28, 1899, and to pay to said receiver the sum of eight hundred dollars (\$800), the value of the bar supplies transferred by a certain resolution of May 4, 1900, from the defendant company herein to the Fifth Avenue Real Estate Company, and it further appearing to the satisfaction of the court that by reason of the said acts and misconduct and contumacious refusal and neglect on the part of the said defendants (naming them) and each of them, the rights and remedies of the creditors of the said James R. Kiernan as permanent receiver of the said The Greater New York

Amusement Company, and of the creditors of the said company, have been defeated, impaired, impeded and prejudiced, and that such acts and misconduct and contumacious refusal and neglect to have actually impaired, impeded and prejudiced the rights and remedies of the said receiver and the said creditors, it is, on motion of James Kearney, Esq., the attorney of James R. Kiernan, as receiver of The Greater New York Amusement Company,

Ordered, adjudged and determined:

1. That the said defendants (insert names) are and each of them is guilty of a willful contempt of court in having knowingly and willfully disobeyed the terms of the aforesaid judgment in the action above entitled dated the 27th day of June, 1902, filed in the office of the clerk of this court on the 25th day of July, 1902, and docketed in said office on the 16th day of October, 1902, of which said judgment a certified copy was duly served on the defendant William L. Stone, Jr., on the 10th day of October, 1902, and on the defendant Meyer L. Sire on the 17th day of December, 1902, and on the defendant Henry B. Sire on the said 17th day of December, 1902, and on the defendant Leander S. Sire on the 16th day of October, 1902, in that in and by said judgment it was among other things ordered, adjudged and decreed: (Set out the matters adjudicated upon failure to perform which contempt proceedings were instituted); and in that although a certified copy of said judgment and due notice of entry thereof was duly personally served upon said defendants as aforesaid the said defendants and each of them, notwithstanding the provisions of said judgment, did willfully and knowingly disregard, disobey and violate the same in that the said defendants (insert names) and each of them have refused and neglected and continue to refuse and neglect to pay forthwith to the said defendant James R. Kiernan, as permanent receiver of the defendant The Greater New York Amusement Company, the sum of twenty-four thousand six hundred and eighty-five dollars and fifty-seven cents (\$24,685.57), the aggregate of the payments made to the defendants (naming them), and have refused and neglected and continue to refuse and neglect to forthwith transfer to the said receiver the furniture, fixtures, fittings and furnishings in and about the New York theater mentioned in said resolution of December 28, 1899, and have refused and neglected and still refuse and neglect in default thereof to pay to the said receiver the sum of nine thousand six hundred and six dollars and seven cents (\$9,606.07), the value thereof, and have refused and neglected and continue to refuse and neglect to forthwith deliver the scenery and costumes of the performance of "The Man in the Moon," and have refused and neglected and still refuse and neglect in default thereof to pay to said receiver the sum of five thousand (\$5,000), the value thereof, and have refused and neglected and continue to refuse and neglect forthwith to pay to said James R. Kiernan, as receiver of The Greater New York Amusement Company, the sum of nineteen thousand five hundred dollars (\$19,500), the value of the program contract between the said defendant company and Frank V. Strauss & Co., transferred by said resolution of December 28, 1899, and have refused and neglected and still refuse and neglect to pay to said receiver the sum of eight hundred dollars (\$800), the value of the bar supplies transferred by said resolution of May 4, 1900, from the defendant company herein to the Fifth Avenue Real Estate Company.

2. That said acts and misconduct and contumacious refusal and neglect on the part of the said defendants (insert names), and each of them, were calculated to and did actually defeat, impair, impede and prejudice the rights and remedies of the creditors of the said defendant company, The Greater New York Amusement Company, and of the said James R. Kiernan as receiver of the said company.

3. That said defendants (insert names), for their said acts and misconduct

and contumacious refusal and neglect, are hereby fined the amount directed to be paid by the said judgment, to wit, the sum of fifty-nine thousand five hundred and ninety-one dollars and sixty-four cents (\$59,591.64); and it is hereby directed that the said defendants pay to the said James R. Kiernan as receiver of The Greater New York Amusement Company the said sum of fifty-nine thousand five hundred and ninety-one dollars and sixty-four cents (\$59,591.64) forthwith.

4. That the said defendants (insert names) be committed by the sheriff of the city and county of New York to the county jail in said county, to be there detained in close custody until they shall have paid the said sum of fifty-nine thousand five hundred and ninety-one dollars and sixty-four cents (\$59,591.64), or they be discharged according to law, and that a warrant issue to execute this order upon a certified copy of the order and proof by affidavit of the non-payment of said sum of money as is herein provided; and it is further ordered that the said defendants pay to the said receiver for his expenses in this proceeding the sum of one hundred dollars (\$100).

Enter: HENRY BISCHOFF, JR.,
Justice Supreme Court.

[SEAL.] THOMAS L. HAMILTON, *Clerk.*

Precedents in Proceeding to Punish Executor for a Contempt for Disobedience of Surrogate's Decree directing the Payment of Money. (Matter of Strong, 111 App. Div. 281.)

Order to Show Cause.

SURROGATE'S COURT — NEW YORK COUNTY.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF J. MONTGOMERY STRONG, AS EXECUTOR, ETC., OF THE ESTATE OF ELIZABETH L. STRONG, DECEASED.

(Recitals.)

Ordered, that J. Montgomery Strong, the executor herein, appear and show cause before this court, to be held at the County Court House, borough of Manhattan, city of New York, on the 30th day of December, 1904, at 10.30 o'clock A. M., of that day, why he should not be punished for a contempt of court for his refusal to comply with the decree of this court, entered herein on March 30, 1903, and for refusing to pay over to said George M. Wright, as assignee, as aforesaid, a creditor of the estate herein, the sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), as in said decree contained, with interest from March 30, 1903, and why said creditor should not have such other and further order and relief as may be proper in the premises.

Service of a copy of this order and of the annexed affidavits on J. Montgomery Strong on any day before the return day hereof shall be sufficient.

Dated at the courthouse, *December 7, 1904.* ABNER C. THOMAS,
Surrogate.

(Same title.)

Affidavit.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

James S. Darcy, being first duly sworn, says:

1. I am an attorney-at-law in the office of Russell & Holmes, attorneys herein for George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, a creditor herein, and since the inception of this matter I have had charge of the same, and am familiar with the facts herein.

2. On March 30, 1903, after the matters had been dragging along for almost five years, a final decree was duly entered herein in the office of the clerk of this court after due notice to J. Montgomery Strong, the executor herein, settling the said executor's accounts herein, and directing distribution of the moneys of the estate in his hands. The said money so in the hands of said executor was by said decree found and adjudged to be a net balance of four thousand five hundred and one dollars and fifty-five cents (\$4,501.55). Said decree directed, among other things, that said J. Montgomery Strong, executor, should out of the said moneys of the estate in his hands pay over to said George M. Wright, as assignee, as aforesaid, the sum of two thousand two hundred and seventy dollars and nineteen cents (\$2,270.19), and the further sum of two hundred and nineteen dollars and ninety-five cents (\$219.95), the latter sum to be paid over out of the distributive share of the said estate apportioned by said decree to Mary L. Spencer, a legatee herein, before any payment on account of said share should be made to said legatee, all as fully appears in said decree on file herein. A true copy of said decree is hereto annexed marked "Exhibit A," and made a part hereof.

3. The aggregate amount of said sums so directed to be paid by said executor to said George M. Wright, as assignee, as aforesaid, by said decree, is the sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14).

4. That a certified copy of said decree, so filed as aforesaid, with a notice of the filing thereof, was duly personally served on said executor by leaving the said certified copy of said decree, with notice of filing thereof indorsed thereon, with said executor personally on April 18, 1903, at the city of New York, and at said time and place payment of the said sums so directed by said decree to be paid to said creditor was also demanded on behalf of said creditor by Edward D. Loughman, a person duly authorized by said creditor to make said demand on behalf of said creditor. A copy of said decree, with notice of filing and demand, with proof of service thereof, is hereto annexed, marked "Exhibit A," and made a part hereof.

5. That though more than a year and a half have elapsed since the entry of said decree, and the service of said decree and said demand on said executor, he has neglected and refused to comply with the terms of said decree and has refused to pay any part of the said sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), and no part thereof has been paid.

6. On April 6, 1903, a transcript of said decree, in so far as it directs payment of said sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), to said creditor, was duly filed and docketed in the office of the clerk of New York county, where said executor then resided, and on April 7, 1903, an execution against the property of said J. Montgomery Strong was duly issued out of this court under the hand of the clerk and the seal of the court, directed to the sheriff of New York county, in which county said executor then resided; that said execution has been returned by said sheriff wholly unsatisfied, and said decree is wholly unsatisfied.

7. That said executor appealed from said decree, so entered as aforesaid, to the Appellate Division of the Supreme Court, First Department, and said decree was unanimously affirmed, with costs, payable personally by said executor.

On behalf of said George M. Wright, as assignee as aforesaid, I ask that an order be granted, requiring said executor to show cause why he should not be punished for a contempt of court in refusing to obey said decree of March 30, 1903, and refusing to pay over to said George M. Wright, as assignee as aforesaid, said sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), as in said decree directed, with interest

from said March 30, 1903, and why said George M. Wright, as assignee, as aforesaid, should not have such other and further order or relief as may be just in the premises.

No other application has been made for this order.
(Jurat.)

JAMES S. DARCY.

Demand for Payment and Proof of Service.

(Same title.)

To J. Montgomery Strong:

SIR.—Please take notice that demand is herewith made that you pay forthwith the sums of money directed to be paid by you to George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, by the decree of this court, bearing date March 30, 1903, viz.: the sum of two thousand two hundred and seventy dollars and nineteen cents (\$2,270.19) and the further sum of two hundred and nineteen dollars and ninety-five cents (\$219.95).

Dated, April 6, 1903.

GEORGE M. WRIGHT,

Assignee for the Benefit of Creditors of Albert B. Hilton,
RUSSELL & HOLMES,
Attorneys for said Assignee.

(Same title.)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Edward D. Loughman, being duly sworn, says he is employed in the office of Horace Russell and is over the age of twenty-one years. That on the 18th day of April, 1903, in Forty-fourth street, New York city, borough of Manhattan, between Fifth and Sixth avenues, opposite the Royalton apartment house, he served on J. Montgomery Strong, also known as Joseph M. Strong, a certified copy of the annexed decree and notice of filing, and an original demand, of which the annexed is a copy, by delivering to and leaving the same with him.

Deponent further says that he knew the said J. Montgomery Strong, also known as Joseph M. Strong, to be the person mentioned and described herein.
(Jurat.)

EDWARD D. LOUGHMAN.

(These papers were followed by affidavits of J. Montgomery Strong and others alleging that he had no means and was unable to make the payments directed by the decree and also by affidavits replying thereto and alleging that said J. Montgomery Strong had, or could obtain, funds to make the payments required.)

Decree of Surrogate Adjudging Defendant Guilty of Contempt.

(Caption and title.)

An order having been granted herein on December 7, 1904, by the Hon. Abner C. Thomas, one of the surrogates of New York county, requiring J. Montgomery Strong, the executor herein, to appear before this court on December 30, 1904, and show cause why he should not be punished for a contempt of court for his refusal to comply with the decree of this court, entered herein March 20, 1903, and for refusing to pay over to George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, a creditor of the estate herein, the sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), as in said decree directed, with interest thereon from March 20, 1903; now, on reading the said decree, filed herein March 20, 1903; and on reading and filing said order to show cause, dated December 7, 1904, together with the affidavit of James B. Darcy, sworn to December 7, 1904, and the papers thereto annexed, and made a part of said affidavit; and on reading and filing the affidavit of Edward D. Loughman,

sworn to December 7, 1904, showing due and timely personal service within the State on said J. Montgomery Strong of said order to show cause, dated December 7, 1904, and the affidavits on which the same was granted, the replying affidavit of James S. Darcy, sworn to January 4, 1905, all in support of said application; and reading and filing the affidavits of said J. Montgomery Strong, sworn to respectively December 29, 1904. and January 4, 1905, the affidavit of John D. Ireland, sworn to December 23, 1904, the affidavit of Frank H. Keller, sworn to December 28, 1904. And after hearing James S. Darcy, Esq., counsel for said creditor, in support of said motion, and William R. Adams, Esq., counsel for said executor, in opposition, and due deliberation having been had; and it satisfactorily appearing that a certified copy of the said decree of this court, entered herein March 20, 1903, was duly personally served on said executor, J. Montgomery Strong, on April 18, 1903, within the city, county and State of New York, and that a due personal demand was likewise duly made on said day upon said executor to comply with said decree and pay said sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14) with interest from March 20, 1903, to said George M. Wright, as assignee as aforesaid, and it appearing that said executor persistently neglects and refuses to obey said decree and pay over said money, and that such refusal prejudices and impairs the rights of said creditor.

Now, on motion of Russell & Holmes, attorneys for said George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, a creditor of the estate herein, it is

Ordered, adjudged and decreed:

1. That said J. Montgomery Strong, the executor herein, is guilty of a contempt of court in having willfully and persistently disobeyed the decree of this court, made and filed herein March 20, 1903, in that he has wholly and willfully neglected and refused, and still neglects and refuses, to pay over to George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, a creditor of the estate herein, upon and after due demand made, the sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), as directed by said decree.

2. That said misconduct, disobedience and refusal and neglect of said J. Montgomery Strong, the executor herein, to comply with said decree, were calculated to, and actually did, defeat, impair, impede and prejudice the rights and remedies of said George M. Wright, as assignee for the benefit of creditors of Albert B. Hilton, a creditor of the estate herein, to his actual loss and injury in said sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), and interest thereon from March 20, 1903, the amount to which he is entitled by the decree of this court, entered herein on March 20, 1903.

3. That said J. Montgomery Strong, the executor herein, for said misconduct and disobedience, is hereby fined the sum of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), the amount directed to be paid over by said decree to said George M. Wright, as assignee, as aforesaid, which sum, with interest thereon, from March 20, 1903, is the amount said creditor is entitled to receive under said decree of this court, dated March 20, 1903, to be paid to said George M. Wright, as assignee, as aforesaid.

4. That said J. Montgomery Strong, the executor, be committed by the sheriff of New York county, to the common jail of said county, to be detained there in close custody until he pay said sum of two thousand four hundred ninety dollars and fourteen cents (\$2,490.14), and interest thereon from March 20, 1903, and that a warrant issue out of and under the seal of this court, directed to the sheriff of the county of New York, commanding him to

take the body of said J. Montgomery Strong, the executor herein, and commit him to the common jail of said county of New York, and there to keep him under his custody until he shall pay the said sum and fine of two thousand four hundred and ninety dollars and fourteen cents (\$2,490.14), with interest thereon from March 20, 1903, to said George M. Wright, as assignee of Albert B. Hilton, a creditor of the estate herein, being the amount which he is entitled to receive under and by the decree in this proceeding entered herein March 20, 1903, or until said executor be discharged according to law.

Filed, *April 3, 1905.*

ABNER C. THOMAS,

Surrogate.

Precedents in Proceeding to Punish Defendants and Their Attorneys for Disobedience of an Injunction (Stolts v. Tuska, 82 App. Div. 81).

Order to Show Cause.

SUPREME COURT — NEW YORK COUNTY.

JULIUS W. STOLTS, AS PRESIDENT OF J. & J. W. STOLTS, AN ASSOCIATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF NEW YORK,
PLAINTIFF,

vs.

MORRIS TUSKA, ROBERT J. WRIGHT AND CARL D. JACKSON (THE LATTER DOING BUSINESS UNDER THE FIRM NAME OF C. D. JACKSON & Co.).
DEFENDANTS.

Upon reading the annexed affidavits of Charles M. Demond, Julius W. Stolts, Max Levy and Walter B. Raymond, verified December 11, 1902, and the copies of letters and diagrams annexed hereto, and upon reading a certified copy of the order of the Appellate Division herein, dated November 21, 1902, with proof of service thereof upon the defendant Jackson, and upon reading a copy of the opinion of said Appellate Division herein, Number 4,570, and upon the printed papers on appeal herein, stipulated to be correct September 30, 1902, and upon all the papers and proceedings herein, it is hereby,

Ordered, that the defendant Carl D. Jackson, and also the defendants Morris Tuska and Robert J. Wright show cause at a Special Term of this court, to be held at the County Court house, borough of Manhattan, city of New York, on the 16th day of November, 1902, at 10:30 A. M., or as soon thereafter as counsel can be heard, why the defendant Carl D. Jackson and his attorneys, Messrs. Eidlitz & Hulse (viz., Ernest F. Eidlitz and Frederick Hulse), should not be punished as for a contempt of court for their and each of their misconduct in failing to obey said injunction order of said Appellate Division, dated November 21, 1902, entered in said Appellate Division clerk's office December 2, 1902, a certified copy of which was filed with the clerk of the county of New York on December 3, 1902, and a certified copy of which order was duly served upon the defendant Jackson and the said McCollum, and why the plaintiff should not have such other and further relief, including its costs and damages, together with the costs of this motion, as may be just and equitable; and sufficient cause to me appearing, service of this order upon the attorneys for each of the defendants on or before the 12th day of December, 1902, shall be sufficient.

Dated, New York, *December 11, 1902.*

JAMES FITZGERALD,

Justice Supreme Court.

Order Adjudging the Defendants and Their Attorneys Guilty of Contempt of Court and Directing Their Punishment.

(Caption and title.)

The plaintiff having procured an order dated December 11, 1902, requiring the defendants to show cause why the defendant Carl D. Jackson and his attorneys, Messrs. Eidlitz & Hulse, viz., Ernest F. Eidlitz and Frederick Hulse, should not be punished as if for contempt of court for their and each of their misconduct in failing to obey an injunction order of the Appellate Division dated November 21, 1902, entered in said Appellate Division clerk's office December 2, 1902, a certified copy of which was filed with the clerk of the county of New York on December 3, 1902, and a certified copy of which order was duly served upon the defendant Jackson, and why the plaintiff should not have such other and further relief, including its costs and damages, together with the costs of said motion, as might be just and equitable. (Further recitals.)

And said motion coming on to be heard before this court on the 16th day of December, 1902.

And after hearing Charles M. Demond, Esq., of counsel for plaintiff, in support of said motion, and Frederick Hulse, Esq., of counsel for the defendant Jackson and Benjamin Tuska, Esq., of counsel for defendant Tuska, in opposition thereto, and due deliberation having been had,

Now, on motion of Charles M. Demond, attorney for plaintiff, it is hereby,
Ordered, adjudged and determined:

First: That the defendant Carl D. Jackson is guilty of a willful contempt of court in having knowingly and willfully disobeyed said injunction order of said Appellate Division, dated November 21, 1902, entered in the office of the clerk of said Appellate Division December 2, 1902, of which a certified copy was filed with the clerk of New York county on December 3, 1902, and of which a certified copy was duly served on the defendant Carl D. Jackson on December 3, 1902, in that in and by said injunction order it was ordered, adjudged and directed among other things as follows: (Recite provisions of injunction.)

And, in that, although a certified copy of said order and due notice of entry thereof was served on said defendant Carl D. Jackson as aforesaid, on December 3, 1902, said defendant and his agents and employees, notwithstanding the provisions of said order, and subsequent to the date of said service thereof and up to the time of the making of said motion, did obstruct and continued to obstruct the use of said private dock or bulkhead mentioned in said order, from the center of the block between 106th and 105th streets to the northerly line of 105th street, although it was necessary for the plaintiff to use said southerly half of said dock in the possession of the defendant Jackson for the receiving of materials to be used in the business of the plaintiff, inasmuch as the northerly half of said dock was wholly out of repair and could not be used, and said northerly part of said dock was wholly inadequate for the requirements of the business conducted by the plaintiff, all of which the defendant Carl D. Jackson well knew. And furthermore in that the said defendant Carl D. Jackson, his agents and servants, notwithstanding the provisions of said order, did obstruct and continue to obstruct the plaintiff from having access to the southerly half of said dock in the possession of the said defendant Jackson from the water of said East river by boats and barges, although the plaintiff needed to use said dock for the purpose of receiving materials to be used in its business; and in that the defendant Carl D. Jackson on the 9th day of December, 1902, together with certain of his agents and employees and Mr. McCollum, a clerk in the office of his attorneys, Messrs. Eidlitz & Hulse, and with the

knowledge and acquiescence and approval of said attorneys, Eidlitz & Hulse, forcibly resisted the attempt of the plaintiff association to unload a cargo of lumber belonging to said plaintiff association, from a barge or lighter, moored in said East river opposite said dock, in the possession of the defendant Jackson, to and upon said dock, and forcibly prevented the plaintiff from unloading said lumber upon said dock, although the defendant Jackson and his attorneys and agents well knew that the northerly half of said dock was wholly out of repair, had been condemned by the dock department, was wholly inadequate for the purpose of receiving any materials of plaintiff to be used in its business, and that it was necessary for the plaintiff to use the southerly portion of said dock for said purpose.

Second. That said misconduct of the defendant Carl D. Jackson was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein.

Third. That said defendant Carl D. Jackson for said misconduct is hereby fined the sum of two hundred and fifty dollars (\$250), together with the sum of ten dollars (\$10) costs in addition, which costs are hereby awarded to the plaintiff, in all, the sum of two hundred and sixty dollars (\$260), and it is hereby directed that the said defendant Carl D. Jackson pay the said sum of two hundred and sixty dollars (\$260) to the plaintiff or its attorney, Charles M. Demond, within two days after the service of a copy of this order upon Messrs. Eidlitz & Hulse, the attorneys for the defendant Jackson, together with notice of the entry thereof.

Fourth. That the said defendant Carl D. Jackson be committed by the sheriff of the city and county of New York to the county jail in said county, to be there detained in close custody until he shall have paid the said sum of two hundred and sixty dollars (\$260), or he be discharged according to law, and that a warrant issue to execute this order unless within two days after the service on the said attorneys for the defendant Jackson of a copy of this order with notice of entry, the said Carl D. Jackson shall pay said sum of two hundred and sixty dollars (\$260) to the plaintiff or its attorney, as is provided in paragraph third of this order. That said warrant shall issue upon a certified copy of this order and proof by affidavit of the non-payment of said sum of money as is herein provided.

And it appearing to the satisfaction of the court that the action of the said attorneys for the defendant Jackson, Messrs. Eidlitz & Hulse, and their representative, Mr. McCollum, in the premises merits condemnation, and that further persistence in such conduct on their part should be visited by penalty, as well as further persistence in such conduct by the defendant Carl D. Jackson, it is,

Further ordered, adjudged and determined

Fifth. That the plaintiff may apply at the foot of this order for further relief in the premises as against the defendant Carl D. Jackson, his attorneys, Messrs. Eidlitz & Hulse, and their representative, Mr. McCollum, upon proof to the court that they, or either of them, further persist in the wrongful acts hereinbefore recited, or continue to disobey or aid in the disobeying of the said injunction order hereinbefore recited.

THOMAS HAMILTON, *Clerk.* Enter:
(Seal.)

JAMES FITZGERALD,
Justice Supreme Court.

Precedents in Proceeding to Punish Defendant for Contempt for Refusing to Obey Final Decree, in Action for Absolute Divorce, Directing Him to Pay Alimony to the Plaintiff. (Stanley v. Stanley, 116 App. Div. 544.)

Order to Show Cause.

(Caption.)

<p>SARAH TAYLOR STANLEY, PLAINTIFF, vs. JAMES WILLIAM STANLEY, DEFENDANT.</p>	}
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On the annexed affidavit of Sarah Taylor Stanley, the plaintiff herein, verified the 21st day of April, 1906, the affidavit of Albert J. Graeffe, verified the 5th day of May, 1906; the affidavit of William H. Lee, verified the 11th day of April, 1906; the decree and order made and entered herein on the 30th day of June, 1900, on all the proceedings herein, and on all the papers hereto annexed, let the defendant show cause before me, or one of the other justices of this court, at Special Term thereof, to be held at the County Court House, in the city of Kingston, county of Ulster, on the 19th day of May, 1906, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein, punishing the defendant, the said James William Stanley, as and for a contempt of this court, in failing and neglecting to pay to the plaintiff, the said Sarah Taylor Stanley, the alimony due and payable to her, pursuant to the order of this court made and entered herein on the 30th day of June, 1900, and why the plaintiff should not have such other and further relief in the premises as may be just and proper.

And sufficient reason appearing therefor, service hereof on the said defendant on or before the 11th day of May, 1906, shall be deemed due and timely.

Enter:

JAMES A. BETTS,
Justice Supreme Court.

Affidavit Read in Support of Motion.

(Title.)

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

SARAH TAYLOR STANLEY, being duly sworn, deposes and says:

1. I am the plaintiff above named. That on the 30th day of June, 1900, a decree of absolute divorce was granted to me by the Hon. James A. Betts, one of the justices of the Supreme Court of the State of New York, county of Ulster, against my husband, James William Stanley, the defendant above named. That by the provisions of the said decree, the said defendant was ordered to pay me the sum of two hundred and eight dollars (\$208) a year from the 1st day of July, 1900, during my natural life, as a suitable allowance to use for my support, and that such allowance be paid to me in manner following: That the sum of seventeen dollars and thirty-three cents (\$17.33) be paid into my hands, or upon my order, or to my attorney of record in said action, on the 1st day of July, 1900; and that the sum of seventeen dollars and thirty-three cents (\$17.33) be paid into my hands, or upon my order, or to my attorney of record in said action, on the first day of each and every month thereafter, during my natural life. And the defendant was, by said decree, further ordered to pay me the sum of one hundred and

fifty dollars (\$150), as counsel fee, and the costs of said action which was taxed and allowed at one hundred and eighty-six dollars and ninety-five cents (\$186.95). And the said decree further provided that if the defendant failed to pay me the said alimony, that I was in such case to have interest thereon from the time or times when the said alimony became due and payable to me.

2. That between the said 30th day of June, 1900, and the 31st day of January, 1906, I made diligent efforts to find my said husband, the defendant, to make demand upon him for the payment to me of my said alimony; but I was unable to ascertain the whereabouts of or to find the defendant and make demand therefor, for the reason the defendant was without the State of New York, and could not be found, and that I was, therefore, unable to procure an order of the court, and get service of the same upon the defendant, to punish him as and for a contempt of this court, in failing and neglecting to pay me my said alimony.

3. That on or about the 25th day of January, 1906, I learned for the first time that the defendant had returned to the city of New York. That on the 31st day of January, 1906, I went to see the defendant at his place of business, at No. 1430 Broadway, in the city of New York; that my attorney, Albert J. Graeffe, went there with me; that I had an interview there with my husband, the defendant, in the presence of my said attorney; that I demanded of the defendant that he pay me the sum of one thousand two hundred and thirty dollars (\$1,230), then due to me for my said alimony; but the defendant refused to pay me the same, or any sum.

4. That the defendant has failed and neglected to pay me the alimony, or any part thereof, due and payable to me under the said decree; that the defendant has not paid me the counsel fee and costs.

5. That the amount due and payable to me from the defendant for my said alimony, together with the interest thereon, from the time or times when the said alimony became due and payable to me under the said decree, is now the sum of one thousand four hundred and seventy-five dollars (\$1,475), and I am dependent on the same and on my future alimony for my support.

6. That I have learned from my attorney, Albert J. Graeffe, that the defendant is about to leave the State of New York; that in such case the defendant will be without the jurisdiction of this court and I will be unable to obtain service upon him of any order or process, to punish him as and for a contempt of this court, in failing and neglecting to pay me my said alimony, and I will in such case be absolutely without any remedy whatsoever, against the defendant, to compel him to obey the order in the said decree to pay me my said alimony. That I have demanded of the defendant, personally, payment of my said alimony; but the defendant has refused to pay me the same; that I have, by a power of attorney in writing, authorized my said attorney to demand and receive my said alimony of the defendant; that my said attorney has made such demand upon the defendant, at the same time exhibiting to the defendant my said authority; but the defendant has refused also to pay the same to my attorney.

That by reason of such failure, neglect, violation of duty and disobedience to the lawful mandate of the court to pay me the sum of money ordered and adjudged by the court to be paid to me by the defendant, my right and remedy may be defeated, impaired, impeded and prejudiced thereby.

7. That the defendant has no real or personal property; that the defendant has sworn in his affidavit, hereto annexed, that he has no money and no means or property of any kind, except his salary. That sequestration proceedings herein, against the defendant, to enforce the payment by him to me of my said alimony would, therefore, be ineffectual.

That for obvious reasons execution has never been issued against the said defendant for my said alimony; nor for my counsel fee and costs in said action.

That no previous application for this order has been made, except that such an application was, on the 1st day of March, 1906, made in the Supreme Court, county of New York, at Special Term, Part I thereof; but the said application was denied by Mr. Justice Greenbaum on the ground of insufficient proof of service of the decree upon the defendant. That the fact now existing for the granting of said order in this new application is, that due service of the decree has, in the meantime, been obtained, and that sufficient proof of said service is hereto annexed.

That I, therefore, pray that this order be granted me.

(Jurat.)

SARAH TAYLOR STANLEY.

(Same title.)

Affidavit read in support of motion.

STATE OF NEW YORK, }
CITY OF KINGSTON, } ss.:
County of Ulster, }

ALBERT J. GRAEFFE, being duly sworn, deposes and says:

1. That he is the attorney for Sarah Taylor Stanley, the plaintiff above named; that he was the attorney of record for the plaintiff in the action for an absolute divorce commenced by the plaintiff herein, on the 28th day of March, 1900, in the Supreme Court of the State of New York, in and for the county of Ulster, against James William Stanley, the defendant above named; that on the 30th day of June, 1900, a decree of absolute divorce was granted in said action by this court in favor of the plaintiff, Sarah Taylor Stanley, against defendant, James William Stanley, that the said decree was duly entered in the office of the clerk of the county of Ulster on the said 30th day of June, 1900.

2. That on the 30th day of July, 1900, at the city of Bridgeport, State of Connecticut, where he then resided and had resided for about two years before the commencement of said action, a certified copy of the said decree was served upon the defendant, James William Stanley, personally. That on the 27th day of August, 1900, deponent wrote a letter to the defendant, addressed to him at said city of Bridgeport, demanding payment of the alimony then due and payable to the plaintiff from the defendant under the said decree; that on the 30th day of August, 1900, the defendant wrote a letter to deponent, in which the defendant acknowledged the receipt of deponent's said letter, but referred deponent to his, defendant's, attorney at said city of Bridgeport respecting the matter of the said alimony.

That at divers times between the said 30th day of June, 1900, and the 31st day of January, 1906, deponent did, at the request of the plaintiff, make diligent efforts to ascertain the whereabouts of, and to find the defendant for the purpose of demanding payment of the alimony due and payable to the plaintiff from the defendant under the provisions of the said decree, and to procure an order and obtain service thereof upon the defendant to punish him as and for a contempt in failing and neglecting to pay the alimony to the plaintiff; that on the 31st day of August, 1900 (and other days stated), this deponent did, at the request of the plaintiff, make further diligent efforts to find the defendant for the purpose aforesaid; but deponent was unable to find the defendant, for the reason the defendant was without the State and a resident of the city of Bridgeport, Conn., and the city of Baltimore, Md. That on the 19th day of January, 1906, deponent went to the city of Bridgeport, Conn., and made diligent efforts to find the defendant, but could not, for the reason the defendant had departed from the said city of Bridgeport about two years previously, and had gone to reside in the city of Baltimore, Md.; that on or about the 25th day of January, 1906, deponent learned that the defendant had left the city of Baltimore and had gone to the city of New York; that this was the first

knowledge that the plaintiff and deponent had of the fact that the defendant had taken up a residence in the city of New York. That the defendant's whereabouts were unknown to the plaintiff and deponent for the period of upwards of five and a half years prior and up to the said 25th day of January, 1906; that the plaintiff was consequently unable, during the said period, to wit, from the said 30th day of June, 1900, to the said 25th day of January, 1906, to find the defendant and to make demand upon him of payment of the alimony due and payable to the plaintiff from the defendant under the said decree, or to procure an order and obtain service thereof upon the defendant to punish him as and for a contempt of this court in failing and neglecting to pay the said alimony to the plaintiff.

3. That on the said 25th day of January, 1906, this deponent found the defendant, James William Stanley, at his place of employment, at No. 1430 Broadway, in the city of New York; that deponent then and there had an interview with the defendant; that during the said interview deponent demanded payment from the defendant of the alimony due and payable to the plaintiff under the said decree, but the defendant refused to pay the same; * * *

4. That on the 1st day of March, 1906, the plaintiff procured an order to show cause why an order should not be made and entered herein punishing the defendant as and for a contempt of this court in failing and neglecting to pay the plaintiff the alimony due her, pursuant to the order made and entered herein on the said 30th day of June, 1900, and why the plaintiff should not have such other and further relief in the premises as might be just and proper. That the said order to show cause was made returnable before one of the justices of this court, at Special Term, Part I thereof, to be held in the county of New York on the 5th day of March, 1906; but as the defendant could not, after diligent efforts, be found and served with the said order to show cause within the time fixed therein, the plaintiff was, therefore, compelled to procure further time from the court in order to effect such service upon the defendant; that the said order to show cause was, therefore, made returnable on the 12th day of March, 1906, at the same place. That on the said 12th day of March, 1906, the said motion came on to be heard before Mr. Justice Greenbaum, who rendered his decision as follows: "Without considering other points raised, sufficient reason for denying the motion exists in failure of proof of due service of the decree on the defendant." * * *

5. That on the 11th day of April, 1906, at the borough of Manhattan, city of New York, a certified copy of said decree of divorce was, in the presence of this deponent, duly served upon the said James William Stanley, the defendant herein, personally, as appears by the affidavit of such service of William H. Lee, verified the said 11th day of April, 1906, and hereto annexed.

6. That on the said 11th day of April, 1906, at the place of employment of the said defendant at No. 1430 Broadway, in the borough of Manhattan, city of New York, this deponent demanded payment of the said defendant, James William Stanley, personally, of the sum of one thousand four hundred and seventy-five dollars (\$1,475), the sum then due and payable to the plaintiff from the defendant for the alimony of the plaintiff under the said decree of the 30th day of June, 1900, together with the interest thereon; that, at the same time, deponent exhibited to the said defendant, James William Stanley, personally the original power of attorney duly executed and acknowledged by the plaintiff, authorizing this deponent to demand and receive the said alimony from the defendant; but the said defendant, James William Stanley, refused to pay the said alimony or any part thereof. That deponent then served upon the said defendant personally the said power of attorney authorizing deponent to demand and receive the said alimony, as aforesaid,

by delivering a true copy thereof to him personally and leaving the same with him, and that deponent knew the person of whom he made the said demand and upon whom he made the said service, as aforesaid, to be the person mentioned and described in the said power of attorney, as James William Stanley, the defendant herein. That William H. Lee was present during the foregoing interview between this deponent and the defendant, James William Stanley; the affidavit of the said William H. Lee, verified the said 11th day of April, 1906, as to the same, is hereto annexed.

The original power of attorney, authorizing deponent to demand and receive the said alimony for the plaintiff from the defendant, is hereto annexed.

7. That if this motion is not granted upon the merits, the plaintiff's right and remedy will be defeated, impaired, impeded and prejudiced by reason of the facts that the plaintiff has made demands upon the defendant for payment of her alimony, due and payable to her from the defendant under the said decree, but the defendant has failed and neglected to pay her the same; that the defendant is about to leave the State and the jurisdiction of this court; that service of any further order or process upon the defendant will, in such event, be rendered impossible.

(Jurat.)

ALBERT J. GRAEFFE.

Order Adjudging Defendant Guilty of a Contempt of Court, and Directing His Punishment.

(Caption and title.)

On reading and filing the order to show cause herein, dated the 5th day of May, 1906, returnable the 19th day of May, 1906, why the defendant herein, James William Stanley, should not be punished as and for a contempt of this court in failing and neglecting to pay to the plaintiff herein, Sarah Taylor Stanley, the alimony due and payable to her from said defendant, pursuant to the order made and entered in this action on the 30th day of June, 1900, which, together with the interest thereon, amounts to the sum of one thousand four hundred and seventy-five dollars (\$1,475), the affidavits in support of said motion of Sarah Taylor Stanley, the plaintiff, verified the 21st day of April, 1906, with the papers thereto annexed; the affidavits of Albert J. Graeffe, verified the 5th and 25th days of May, 1906, with the papers thereto annexed; the copy of the decree in this action; the affidavits of William H. Lee, verified the 11th day of April, 1906, the power of attorney executed by the plaintiff herein, Sarah Taylor Stanley, on the 9th day of April, 1906, authorizing Albert J. Graeffe to demand for and receive from the said defendant, James William Stanley, the said sum of one thousand four hundred and seventy-five dollars (\$1,475), alimony due and payable to the plaintiff from said defendant, pursuant to said order; and the affidavits in opposition to said motion of James William Stanley, the defendant herein, verified the 16th and 28th days of May, 1906, and the affidavit of Isaac N. Jacobson, the defendant's attorney, verified the 18th day of May, 1906, and said motion coming on regularly to be heard at a Special Term of this court, held at the County Court House in the city of Kingston, county of Ulster, State of New York.

And after hearing Albert J. Graeffe, Esq., attorney for the plaintiff in support of said motion, and Isaac N. Jacobson, Esq., attorney for the defendant, in opposition thereto, it is hereby

Ordered, adjudged and determined

1. That the said defendant, James William Stanley, is guilty of a contempt of court in having willfully disobeyed the order made in this action on the 30th day of June, 1900, in failing and neglecting to pay the plaintiff, Sarah Taylor Stanley, the alimony due and payable to her, pursuant to said order, amounting to the sum of one thousand four hundred and seventy-five dollars (\$1,475.)

2. That the said misconduct of said defendant, James William Stanley, was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein, to her actual loss and injury in the sum of one thousand four hundred and seventy-five dollars (\$1,475), the sum due and payable to her from said defendant for plaintiff's said alimony, besides the costs in this action.

3. That the said defendant, James William Stanley, for said misconduct is hereby fined the sum of one thousand four hundred and eighty-five dollars (\$1,485), to be paid to the plaintiff or her attorney, Albert J. Graeffe, being said sum, together with ten dollars (\$10) costs in this action.

4. That the said defendant, James William Stanley, be committed by the sheriff of the county of Ulster to the county jail of said county, to be there detained in close custody until he, said defendant, shall pay said sum or be discharged according to law, and that a warrant issue to execute this order.

Enter:

JAMES A. BETTS,
Justice Supreme Court.

Proceeding to Punish Witness in Surrogate's Court for Refusing to Disclose Information Regarding Assets of Estate (Matter of King v. Ashley, 179 N. Y. 280).

Petition.

SURROGATE'S COURT — WARREN COUNTY.

IN THE MATTER OF THE APPLICATION OF H. PRIOR KING, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM MOORE, DECEASED, FOR A DISCOVERY, <i>v.</i> EUGENE L. ASHLEY.	}
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To the Surrogate's Court of the County of Warren:

The petition of H. Prior King of the village of Glens Falls, N. Y., in said county, respectfully shows:

1. That your petitioner is the executor of the last will and testament of William Moore, deceased, and that letters testamentary of said estate were issued to your petitioner by this court on the 4th day of March, 1904; that he has duly qualified and entered upon the discharge of his duties as such executor.

2. That in and by the said last will and testament the said William Moore gave and bequeathed unto his executor in trust, for certain specified purposes, all the property and estate which was given deceased or bequeathed to him in and by the last will and testament of William Van Rensselaer, deceased, or which might be received from the estate of said Van Rensselaer by will or otherwise; that several years prior to the execution of the said last will and testament and on or about the time of the execution of another will drawn for the said William Moore by your petitioner, in which your petitioner was also named as executor, the said William Moore informed your petitioner that all information regarding the property of the Van Rensselaer estate and the interest of the said Moore therein was contained in the safety deposit box of the said Moore in the Glens Falls National bank, in the village of Glens Falls, N. Y., and that upon examination of the contents of the said box, after the decease of said Moore, your petitioner could ascertain the facts regarding the nature and location of the property of the said Van Rensselaer estate which might belong to the said Moore; that your petitioner was led to believe by the said Moore that the interest of the said Moore in the said Van Rensselaer

estate would eventually amount to upwards of two hundred thousand dollars (\$200,000).

3. That prior to the appointment of your petitioner as executor of the said will, and while your petitioner was acting as the temporary administrator of the estate of said William Moore, to which position your petitioner was duly appointed by this court pending a contest over the said last will and testament of said Moore, your petitioner, accompanied by his counsel, and by William Hubbell Moore, the contestant of said will, and by Jerome N. Hubbell, his special guardian, and by H. C. Todd, his counsel, went to the vaults of the Glens Falls National Bank and opened the safety deposit box of the said Moore and examined the contents thereof in the presence of the persons named and others; that no papers were found by your petitioner in said box which related in any way to the said Van Rensselaer estate, or the interests of the said Moore therein, or which threw any light whatever upon the supposed bequest of the said Van Rensselaer to the said Moore and that your petitioner has made diligent inquiry and search in other quarters and in all places where it seemed to him that such knowledge might be obtained, but has not been able to ascertain any facts regarding the said Van Rensselaer estate or the interests of the said Moore therein, except as above set forth, and has not found any property of the said estate belonging to the said Moore, or any information as to where the said property, or any facts regarding the same, can be found or ascertained.

4. That while your petitioner was acting as such temporary administrator of the estate of William Moore, your petitioner, as such temporary administrator, presented a petition to this court asking for the examination of one Eugene L. Ashley, for the purpose of ascertaining what knowledge or information the said Ashley had, if any, in regard to the said Van Rensselaer estate; that upon the examination had in pursuance of the citation issued upon said petition, the said Ashley testified that he had in his possession certain memoranda which he had made relating to the said Van Rensselaer estate; that he had seen property which was said to belong to the said Van Rensselaer estate, and that he had in his possession a will drawn by him for the said Moore during the year 1900, in and by which will the said testator purported to dispose of the said Van Rensselaer estate; that the said Ashley was not required by this court to disclose the location of the said property of the Van Rensselaer estate, or to give other information sought in regard to the same, for the reason that, as the said Ashley testified, his knowledge related only to real estate, he could not be compelled to divulge his information in regard to the same upon an inquiry instituted by a temporary administrator.

5. That because of the facts disclosed upon the said examination of the said Ashley, your petitioner believes that the said Moore imparted to the said Ashley certain facts regarding the property of the said Van Rensselaer estate and the interest of the said Moore therein; and your petitioner was so informed by the said Moore in his lifetime; and your petitioner further believes that the said Ashley has in his possession, or under his control, papers relating to the said Van Rensselaer estate, which papers were formerly in possession of said Moore, or has knowledge or information which may enable your petitioner to ascertain the location, extent and value of the said Van Rensselaer estate, and the nature of the interest of the estate of the said Moore therein.

6. That the said Ashley withholds the said knowledge or information concerning the said Van Rensselaer estate from your petitioner, and also withholds from your petitioner any papers or documents which now belong to the estate of the said Moore and refuses to impart any knowledge or informa-

tion he may have concerning the same, or to deliver the said papers or documents which he has, if any, to your petitioner, or to disclose any other facts which will aid your petitioner in making discovery of such property so that it can be inventoried and appraised as a part of the estate of the said Moore.

7. That your petitioner, through his counsel, has demanded the said property, papers and documents from the said Ashley and has asked the said Ashley to furnish your petitioner with any information or knowledge which he may have regarding the estate of the said William Van Rensselaer, and the interest of the estate of the said Moore therein, but that the said Ashley has refused to deliver any of the said property to your petitioner, or to give your petitioner any information whatever regarding the same.

8. That appraisers of the goods, chattels and credits of the said William Moore have been duly appointed by this court and have entered upon the discharge of their duties as such appraisers, and that any property belonging to the estate of the said William Moore which came to his said estate from the estate of said Van Rensselaer should be delivered to your petitioner that it may be inventoried and appraised by the said appraisers.

WHEREFORE, Your petitioner prays for an inquiry respecting the property aforesaid by this court, and that the said Eugene L. Ashley may be cited to attend the inquiry and be examined accordingly and to deliver to your petitioner the said property, if in his control, and to disclose any knowledge or information he may have concerning the same, or any facts which may aid your petitioner as executor of the estate of said William Moore in making discovery of such property so that it can be inventoried and appraised.

Dated, *March 23, 1904.*
(Add verification.)

H. PRIOR KING,
Petitioner.

(Same title.)

Affidavit of Edward M. Angell.

STATE OF NEW YORK, } ss.:
COUNTY OF WARREN, }

EDWARD M. ANGELL, being duly sworn, says that he resides in the village of Glens Falls, N. Y., and is an attorney and counsellor-at-law, and is the attorney for H. Prior King, the executor of the estate of said William Moore.

That on the 18th day of March, 1904, deponent called upon Eugene L. Ashley, in his office in said village of Glens Falls, and informed the said Ashley that he was acting as attorney for the said executor of the said Moore estate and asked the said Ashley if he would give to deponent, or to said executor, what information he, the said Ashley, possessed regarding the estate of William Van Rensselaer; that said Ashley informed deponent that he did not care to talk about it and asked deponent to put his request for information in writing; that deponent said that he was willing to do so, and would do so if the said Ashley would give deponent a prompt response to his written request; and that said Ashley informed deponent that he would reply promptly to any written request; that thereupon and upon the same day deponent caused to be delivered to the said Ashley, personally, a letter requesting information regarding the Van Rensselaer estate, its location and extent and various other matters connected therewith, and in the said letter deponent informed the said Ashley that if deponent did not hear from him on or before Tuesday, the 22d of March, 1904, that deponent would take it as a refusal on the part of the said Ashley to furnish the information requested; that the said 22d day of March has passed and that deponent has not received any of the desired information from the said Ashley, or an answer to any of the questions therein asked and deponent has not extended the time of the said Ashley to answer the said communication, or to reply thereto.

Order Punishing Contempt.

(Caption and title.)

H. Prior King, as executor of the estate of William Moore, deceased, having heretofore presented his petition in writing to this court, which petition was dated and verified the 23d day of March, 1904, reciting that the said petitioner had been duly appointed as executor of the said estate and had duly appointed as executor of the said estate and had duly qualified and entered upon the discharge of his duties, and that in and by the last will and testament of the said William Moore, said William Moore bequeathed to his executor in trust for certain specified purposes all the property and estate which was given said deceased, or bequeathed to him in and by the last will and testament of one William Van Rensselaer, deceased; and that the said executor, by diligent inquiry, had been unable to find any trace of the said Van Rensselaer estate or to acquire any information as to where the said Van Rensselaer estate was located; and showing that the said Eugene L. Ashley had in his possession certain knowledge or information which would aid the said executor in discovering the said Van Rensselaer estate; and that the said Ashley refused to impart the said knowledge or information to the said executor; and praying for an inquiry respecting the property aforesaid; and that the said Ashley be cited to attend the inquiry and disclose any knowledge or information he might have concerning the same and any facts which might aid the said executor in making discovery of the said property so it could be inventoried and appraised; and a citation and order having been issued by this court, in pursuance of provisions of sections 2707 and 2709 of the Code of Civil Procedure, commanding the said Ashley to attend before the surrogate of said county of Warren, State of New York, at his office in the village of Glens Falls, in said county, on the 29th day of March, 1904, at ten o'clock in the forenoon, an inquiry concerning the property belonging to the said estate; and the said order and citation having been returned with proof of due service thereof, and the said matter having been adjourned from time to time until this day; and the said Ashley having appeared upon this day personally and by Henry W. Williams, his attorney (the appearance of the said Ashley by attorney having been objected to by the said executor); and the said executor having appeared in person and by Edward M. Angell, his attorney; and it having been agreed and stipulated in open court that the appearance of said Ashley is made at this time with the same force and effect as if this had been the day and hour named in the citation as the day and hour for which the said proceeding was returnable and preliminary objections having been filed and overruled and exception taken; and the said Ashley having been duly sworn as a witness and having been examined by the counsel for the said executor; and the said Ashley having testified that he had been informed where the will of the said William Van Rensselaer was probated, and having then been asked by the counsel for said executor the following question: "Where have you been informed it was probated?" and the said Ashley having declined and refused to answer the said question after having been directed to do so by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know where William Van Rensselaer lived during his lifetime?" and the said Ashley having declined and refused to answer the said question, after having been directed to do so by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know who the executors or trustees of and under the will of William Van Rensselaer are?" and the said Ashley having refused and declined to answer the said question, after having been directed to answer the same by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know where any of the property, real or personal, of the estate of William Van Rensselaer is situate?" and the said Ashley having refused and declined to answer the said question, after having been directed to answer the same by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know the provisions of the will of William Van Rensselaer so far as it related to the interest of William Moore in the said Van Rensselaer estate?" and the said Ashley having declined and refused to answer the said question, after having been directed to answer the same by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know the value of the interest, or approximate value of the interest, of the estate of William Moore in the estate of said William Van Rensselaer?" and the said Ashley having declined and refused to answer the said question, after having been ordered and directed to answer the same by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know whether there is a life tenant of the Van Rensselaer estate and that the interest of William Moore in that estate vests or comes into possession upon the death of that life tenant?" and the said Ashley having declined and refused to answer the said question, after having been ordered and directed to do so by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know who the life tenant of the Van Rensselaer estate is?" and the said Ashley having declined and refused to answer the said question, after having been ordered and directed to do so by the court;

And the counsel for the said executor having asked the said Ashley the following question: "Do you know where the life tenant lives?" and the said Ashley having declined and refused to answer the said question, after having been ordered and directed to do so by the court;

And the counsel for the executor having requested and moved that the said Ashley be punished for contempt for his refusal to obey the direction and mandates of the court in refusing to answer the questions above specified after having been ordered and directed to do so by the said court, he having been directed to answer all of said questions by said court, and upon all the proceedings had and testimony taken, it is

Ordered, adjudged and decreed, that the said Eugene L. Ashley is in contempt of this court for his refusal to answer the questions herein specified after having been directed to do so by the court; and it is

Further ordered, adjudged and decreed, that the said Eugene L. Ashley, as a punishment for the said contempt be, and he hereby is, fined in the sum of \$100, payable forthwith; and it is

Further ordered, adjudged and decreed, that the said Ashley be, and he hereby is, given until the 7th day of April, 1904, at ten o'clock in the forenoon, to answer the questions above specified, and if the said Ashley does not come before the court in the surrogate's office in the village of Glens Falls, N. Y., at that time and answer the questions above specified that he be imprisoned in the common jail of the county of Warren until he shall answer the said questions and pay the said fine; and that if the said questions are not answered by the said Ashley at the time and place specified, a warrant for his commitment to the said Warren county jail be issued accordingly.

LYMAN JENKINS,
Surrogate.

Proceeding to Punish Executor for Refusing to Comply with Decree of Surrogate's Court Directing Him to Make Certain Payments to Persons Therein Named. (Matter of Holmes, 79 App. Div. 267, 176 N. Y. 604.)

Order to Show why Appellant Should not be Punished for Contempt.

**IN THE MATTER OF THE FINAL JUDICIAL
SETTLEMENT OF THE ESTATE OF MARY E.
HOLMES, DECEASED.**

(Caption.)

(Recitals.)

Now, on motion of George W. Ray, attorney for Minnie I. Burnap, general guardian of Inez Burnap, John Burnap and Nina Burnap, and on motion of E. E. Mellon, individually, and as attorney for John D. Gutches, Ella L. Gutches, Cora Loomis and M. L. Totman, general guardian of said George Gutches, and on motion of Nelson P. Bonney, individually; and on said decree made and entered herein on the 25th day of November, 1901, and on all the papers filed in the above-entitled proceeding, let William S. Holmes show cause, at a term of this court to be held on the 19th day of May, 1902, at ten o'clock in the forenoon of that day, at said surrogate's office in the village of Norwich, N. Y., why he should not be punished for contempt of this court for his refusal and willful neglect to obey said decree of the 25th day of November, 1901, in that he has not paid to the aforesaid parties, excepting Cora Loomis, the sums set opposite their names, and except a portion of the amount to M. J. Cronk, and why such further proceedings to that end should not be had as to the court may seem just.

ALBERT F. GLADDING,
Surrogate.

Affidavits on Which the Foregoing Order to Show Cause was Granted.

(Same title.)

STATE OF NEW YORK, } ss.:
COUNTY OF CHENANGO,

NELSON P. BONNEY, being duly sworn, deposes and says, that he is an attorney-at-law and a clerk in the office of Geo. W. Ray, attorney for Minnie I. Burnap, general guardian of Inez Burnap, John Burnap and Nina Burnap, in the above-entitled matter, and that deponent was special guardian herein of said Inez Burnap, John Burnap and Nina Burnap who are infant legatees named in the last will and testament of said Mary E. Holmes.

That on the 25th day of November, 1901, a decree was made and entered in the office of the surrogate of the county of Chenango, N. Y., by which decree one William S. Holmes, one of the executors of said estate, was directed to pay out of the funds of said estate adjudged to be in his hands, to the following-named parties the sums set opposite their names, respectively, viz.: (Recite contents of decree.)

Deponent further says that a copy of said decree, duly certified, was personally served upon said William S. Holmes, the person required thereby to obey it, on the 11th day of December, 1901, as deponent is informed by the affidavit of David L. Maxfield and verily believes.

That on the 4th day of January, 1902, as deponent is informed by the affidavit of E. E. Mellon, demand was made upon said William S. Holmes, personally, by said E. E. Mellon, on behalf of each of the above-named parties, for the sums set opposite their names, and deponent further says that said William S. Holmes nevertheless refuses or willfully neglects to pay said sums of money as aforesaid and has not paid said sums nor any part thereof, except that as deponent is informed and believes said Holmes has paid a portion of the sum directed to be paid to M. J. Cronk.

Deponent further says that execution has been duly issued as prescribed in section 2554 of the Code of Civil Procedure to the sheriffs of Chenango county and Broome county, in which latter county deponent is informed and believes said William S. Holmes resides, and that said executions have been returned wholly unsatisfied.

And deponent verily believes that said decree which said William S. Holmes refuses or willfully neglects to obey should be enforced by punishing the said William S. Holmes for contempt of this court.

(Jurat.)

NELSON P. BONNEY.

(Same title.)

STATE OF NEW YORK, } ss.:
COUNTY OF CORTLAND,

E. E. MELLON, being duly sworn, deposes and says, that he is the attorney for John Gutches, Ella M. Gutches, and was special guardian for George Gutches, an infant, in the above-entitled proceeding, and is attorney for M. L. Totman, general guardian for said George Gutches, an infant.

That on the 4th day of January, 1902, at Whitney's Point, Broome county, N. Y., deponent was attorney and special guardian for the above-named persons, who are legatees under the terms of the will of said Mary E. Holmes,

That on said 4th day of January, 1902, deponent made a personal demand upon said William S. Holmes, one of the executors, demanding payment to John D. Gutches, of the sum of two hundred and ninety-nine dollars and five cents (\$299.05), (further recital of demand).

That all of aforesaid persons and infants are legatees under the terms of the will of said Mary E. Holmes, deceased; that at the same time deponent demanded payment to Nelson P. Bonney of the sum of one hundred and ten dollars (\$110), being costs and expenses of the trial of the issue on the objections to said accounting; said Nelson P. Bonney having been duly appointed by this court as special guardian of Inez Burnap, John Burnap and Nina Burnap, infants; and that said Holmes pay to this deponent, E. E. Mellon, the sum of one hundred and sixty-four dollars (\$164), being the costs allowed to him by the court as special guardian herein of George Gutches, for the trial of the issue on the objections to the accounting of said executor, William S. Holmes.

That a personal demand was made upon said William S. Holmes on the 4th day of January, 1902, that he pay to each of the persons above named, the aforesaid amounts as above specified as he was directed to do by a decree of Hon. Albert F. Gladding, surrogate of Chenango county, and said decree having been filed and recorded on the 25th day of November, 1901, in the Chenango county surrogate's office.

That said William S. Holmes, executor, refused to make such payments and said to deponent that he positively refused to obey the decree of said Surrogate's Court, and that he would not pay the amounts which he was directed to pay to the several persons, above named, as he was directed to do by said decree.

That as deponent is informed and believes said William S. Holmes has failed to comply with the order and decree of the Surrogate's Court of Chenango county, N. Y.

E. E. MELLON.

(Jurat.)

(Same title.)

STATE OF NEW YORK, } ss.:
COUNTY OF CORTLAND,

E. E. MELLON, being duly sworn, deposes and says, that he is an attorney-at-law, and resides at Cortland, in said county and State; that on the 4th day of January, 1902, when said deponent made demand upon William S.

Holmes, one of the executors of the estate of said Mary E. Holmes, for the sums of money directed to be paid by said William S. Holmes in the decree herein made and entered in the said Surrogate's Court on the 25th day of November, 1901, to John D. Gutches, Ella L. Gutches, M. L. Totman, as general guardian of George Gutches, Minnie I. Burnap, as general guardian of Inez Burnap, John Burnap and Nina Burnap, and Nelson P. Bonney, this deponent was duly authorized to make such demand upon said William S. Holmes and deponent was duly authorized to receive said moneys so directed to be paid for said parties, and deponent was so authorized to make such demand and to receive such moneys by said parties and by their attorneys, in this proceeding.

E. E. MELLON.

(Jurat.)

(Same title.) **Preliminary Objections to Order to Show Cause.**

William S. Holmes, the respondent in this proceeding, appears herein specially, by Edmund B. Jenks, Esq., his attorney, and moves that the order made herein by Hon. Albert F. Gladding on the 2d day of May, 1902, be vacated, and this proceeding to punish him for a contempt be dismissed, with costs, upon the grounds that said order is void for the following reasons:

First. That it fails to direct that a copy of the affidavits upon which the same purports to have been granted be served upon said respondent.

Second. That it appears upon the face of said order that parties have improperly joined in an attempt to enforce, by a contempt proceeding, the decree in said order referred to; said decree, being several and not joint, cannot be enforced by a proceeding instituted by the moving parties herein jointly to punish said executor, the respondent herein, for a contempt of court in not obeying said decree.

Third. That it appears upon the face of said order, and by the motion papers herein, that the sums referred to in said order which the said William S. Holmes was, by the decree therein mentioned, directed to pay to said E. E. Mellon and said Nelson P. Bonney was awarded to them as costs, and not otherwise, and that the said sums were, by said decree, charged against said William S. Holmes personally, and not otherwise.

EDMUND B. JENKS,
Respondent's Attorney.

(Same title.) **Answer to Order to Show Cause.**

William S. Holmes, one of the executors of the will of said Mary E. Holmes, deceased, the respondent herein, in answer to the order to show cause why he should not be punished for a contempt, granted by Hon. Albert F. Gladding, surrogate, on the 2d day of May, 1902, upon the annexed affidavits of Arthur H. Pellette, Edmund B. Jenks and himself, and upon the decree made and entered herein on the 25th day of November, 1901, and upon all of the papers filed in the above-entitled proceeding, respectfully shows to this court and alleges:

First. That he has not been guilty of the contempt of court as specified in said order.

Second. That the sums of money which he was, by the decree referred to in said order, directed to pay to said E. E. Mellon and said Nelson P. Bonney were allowed to them as costs, and not otherwise, and were by said decree made a personal charge against this respondent.

Third. That said respondent is nearly eighty-two years of age, in a feeble condition of body and suffering from heart and lung troubles, and that by reason thereof he would probably live but a short time if he were confined in any penal institution.

Fourth. That an appeal from so much of the decree mentioned in said

order as directs said respondent to pay the several sums of money therein mentioned has been duly taken and perfected, and that the same is now pending in the Appellate Division of the Supreme Court for the Third Judicial Department.

Fifth. That, since said decree mentioned in said order was made and entered, said respondent has not possessed sufficient funds to pay the several sums of money which he was by said decree directed to pay, or any part thereof, and that he does not now possess sufficient funds to pay the same, or any part thereof.

WHEREFORE, said respondent asks that said order be vacated and this proceeding to punish him for a contempt be dismissed, with costs, and for such other and further relief as may be just.

EDMUND B. JENKS,
Respondent's Attorney.

Order of Surrogate Committing Executor for Contempt of Court.

(Caption and title.)

Upon the return of the order to show cause herein, dated the 2d day of May, 1902, wherein it was, among other things, ordered that William S. Holmes, executor of the last will and testament of Mary E. Holmes, show cause at a term of this court to be held on the 19th day of May, 1902, at ten o'clock in the forenoon of that day at said surrogate's office in the village of Norwich, N. Y., why he should not be punished for contempt of this court for his refusal and willful neglect to obey the decree made and entered herein on the 25th day of November, 1901, in that he has not paid to the following-named parties the sum set opposite their names, respectively, as in said decree ordered, to wit: (Recite names and amounts).

In all the sum of one thousand seven hundred and ninety-four dollars and thirty cents (\$1,794.30); and why such further proceedings to that end should not be had as to the court may seem just.

And on reading and filing the affidavits of Nelson P. Bonney, E. E. Mellon, Minnie I. Burnap and David L. Maxfield, on which said order to show cause was based, and the due proof of due service of all of said papers including said decree of November 25, 1901, on said William S. Holmes, and on reading and filing the affidavits of Edmund B. Jenks, William S. Holmes and Arthur H. Pellette submitted in opposition to said motion; now after hearing E. E. Mellon and Nelson P. Bonney for the motion and Edmund B. Jenks in opposition thereto, it is hereby determined and adjudged that said refusal and neglect by said William S. Holmes to pay said money as aforesaid was calculated to and actually did defeat, impair and impede the rights of said parties to this proceeding.

And it appearing that said William S. Holmes has refused and willfully neglected to pay to said parties said sums set opposite their names, and that said parties were injured in the amount of said sums so set opposite their names, it is hereby

Adjudged and determined that said refusal and willful omission to pay to said parties said sums set opposite their names, amounted to and do constitute a contempt of this court, on the part of said William S. Holmes. Also it is hereby

Ordered, that said motion be granted, and the same is hereby granted, with regard to the payments to the parties herein specified; and it is further

Ordered and adjudged, that said William S. Holmes should be punished for the said offense and contempt hereinbefore set forth, and it is hereby

Ordered and directed, that he be punished therefor and that he be and hereby is fined the sum of one thousand seven hundred and ninety-four

dollars and thirty cents (\$1,794.30), and a fine is hereby imposed upon him to that amount, and it is further

Ordered, that said William S. Holmes be imprisoned in the county jail of the county of Broome, N. Y., until he pay the said sum of one thousand seven hundred and ninety-four dollars and thirty cents (\$1,794.30) by paying (Recite names and amounts.) It is further

Ordered, that the sheriff of the county of Broome be and he hereby is commanded to take the body and person of said William S. Holmes, if he shall be found within the county of Broome, and commit him to and detain him in the county jail of said county of Broome until he shall have paid said sum of one thousand seven hundred and ninety-four dollars and thirty cents (\$1,794.30) in the manner aforesaid, or until the further order of this court. And it is further

Ordered, that the petitioners herein recover of said William S. Holmes the sum of twenty-five dollars (\$25) costs of this proceeding and motion to punish said William S. Holmes for contempt.

ALBERT F. GLADDING,
Surrogate.

CORPORATIONS.

Corporations, appraisal of stock of, 811.
Corporations, dissolution, proceedings for voluntary, 815.
Corporations, election of officers, supervision of, 893.
Corporations, name of, change of, 902.
Corporate real estate, sale of, 910.
Corporations, receivers of, 926.

The special proceedings which relate to corporations are grouped under the general title "Corporations," but each proceeding is separately treated under the principal heading in alphabetical order as above, where the page will be found at which each proceeding begins.

CORPORATIONS, APPRAISAL OF PROPERTY ON APPLICATION OF NON-CONSENTING STOCKHOLDERS. § 17, Stock Corporation Law.

PRECEDENTS.

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Notice of objection to sale.	813
Order granting application and appointing appraisers.	813
Petition for appointment of appraisers of stock of domestic corporation.	812

The provisions of the section of the law which follow refer to the preceding section which authorizes the sale of property of the corporation.

§ 17. Rights of non-consenting stockholders on voluntary sale of franchise and property.

If any stockholder not voting in favor of such proposed sale and conveyance shall at such meeting, or within twenty days thereafter, object to such sale, and demand payment for his stock, he may, within sixty days after such meeting, apply to the supreme court at any special term thereof held in the district in which the principal place of business of such corporation is situated, upon eight days' notice to the corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate the time and place of their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such corporation and another to such stockholder, if demanded; the charges and expenses of the appraisers shall be paid by the corporation. When the corporation shall have paid the amount of such appraisal as directed by the court, such stockholders shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation.

Source.—Former Stock Corporation Law (L. 1890, chap. 564), section 33, in part, as added by Laws of 1893, chapter 638, and amended by Laws of 1901, chapter 130.

Consolidators' note. This section is part of section 33, made into a new section without change, except heading is added, as explained in note last preceding section.

Consolidators' note to section 16. Section 33 has been transferred to article 2, as it is a general provision. It has been divided into two sections so that its provisions will stand out in plain view. The word "Voluntary" has been added to heading to distinguish it from sale under mortgages or judgment provided for by section 11.

This is a special proceeding under the Code, section 3334. Section 33 of the Stock Corporation Law, providing that an application for an appraisal of the stock of a corporation which sells its property and franchises to another corporation, must be made within sixty days after the meeting of stockholders at which the sale was authorized, only requires the notice of such application to be served within sixty days; the hearing itself may be had after that period has expired. *Matter of Ennis v. Federal Brewing Co.*, 123 App. Div. 691, 108 Supp. 230; aff'd on opinion below, 192 N. Y. 570.

Appraisal of Stock of Domestic Corporation.

Precedents in proceeding under and pursuant to section 33 of the Stock Corporation Law for the appraisal and sale of stock of a domestic corporation, owned by a stockholder who objects to the sale of the property, franchises and assets of such corporation, to another corporation, pursuant to a resolution adopted by owners of two-thirds of the stock. (Matter of Ennis v. Federal Brewing Co., 123 App. Div. 691, 192 N. Y. 570.)

Petition for Appointment of Appraisers of Stock of Domestic Corporation.

SUPREME COURT — KINGS COUNTY.

IN THE MATTER OF THE APPLICATION OF
JAMES J. ENNIS FOR THE APPOINTMENT
OF APPRAISERS, ETC.,
THE FEDERAL BREWING COMPANY.

To the Supreme Court of the State of New York:

The petition of James J. Ennis respectfully shows and alleges:

First. That the Federal Brewing Company is a domestic stock corporation, duly organized, and existing, under and by virtue of the laws of the State of New York, and that its principal place of business is located in the borough of Brooklyn, within the second judicial department.

Second. That your petitioner is the holder and owner of forty-five (45) shares of stock in said corporation of the par value of four thousand five hundred dollars (\$4,500).

Third. That heretofore, and on or about the 27th day of April, 1907, at a meeting of the said corporation, a resolution was passed, authorizing the officers thereof to sell and transfer to the New York & Brooklyn Brewing Company all the property, rights, privileges, franchises and assets of the said Federal Brewing Company, and that thereafter the said property, pursuant to said resolution, was sold, transferred and conveyed to the said New York & Brooklyn Brewing Company.

Fourth. That your petitioner was present at the said meeting and voted with the minority against the adoption of the said resolution, and objected to said sale and transfer.

Fifth. That thereafter, and on or about the 16th day of May, 1907, and within twenty (20) days after the said meeting, your petitioner caused a notice in writing, subscribed by him, to be served upon the said Federal Brewing Company, as appears by the affidavit of James F. Fisher, hereto annexed, demanding the payment of forty-five (45) shares of the par value of one hundred dollars (\$100) each; copy of which notice is hereto annexed and made a part hereof.

Sixth. Your petitioner further states that sixty (60) days have not elapsed since the said meeting.

Seventh. That the New York & Brooklyn Brewing Company is a stock corporation, organized and engaged in a business of the same general character as the Federal Brewing Company.

Eighth. Your petitioner therefore prays that an order be made, appointing three (3) persons to appraise the value of your petitioner's stock and designate the time and place of their proceedings, as shall be deemed proper, and also direct the manner in which payment of your petitioner's stock shall be made to him pursuant to the statutes of the State of New York, in such case made and provided.

JAMES J. ENNIS,

Petitioner.

Dated, Brooklyn, N. Y., June 14, 1907.

(Add verification.)

(Annexed hereto were affidavits of persons, other than petitioner, stating facts in support of his petition.)

Notice of Objection to Sale.

Please take notice that I, the undersigned, the owner and holder of forty-five (45) shares, certificate No. . . , of the Federal Brewing Company, of the par value of one hundred dollars (\$100) each, not voting in favor of the sale proposed at the meeting of stockholders, held April 27, 1907, do hereby object to the sale by you of all the property, rights, privileges and franchises or any interest therein or part thereof to the New York & Brooklyn Brewing Company, or to Frank Reynolds, or to any other corporation or person; and I do hereby serve notice upon you that I demand the payment of my stock. This notice is served upon you pursuant to the statute in such case made and provided.

Dated, Brooklyn, N. Y., May 16, 1907.

Yours, &c.,

JAMES J. ENNIS,
Stockholder.

To the Officers and Directors of the Federal Brewing Company:

(Annexed hereto affidavits of service of above notice on the Federal Brewing Company by delivering the same to the president of said company, personally, and also by delivering a copy thereof to a person then at, and in charge of, the office of said Federal Brewing Company.)

Order Granting Application and Appointing Appraisers.

(Caption and title.)

On reading and filing the notice herein, dated June 14, 1907, that a motion would be made at a Special Term of the Supreme Court to be held in and for the county of Kings, at the courthouse in the borough of Brooklyn, city of New York, on the 28th day of June, 1907, at the opening of said court, or as soon thereafter as counsel can be heard, for an order appointing three persons to appraise the value of the petitioner's stock pursuant to the statute in such case made and provided, and for such other and further relief as to this court may seem just and proper, the petition of James J. Ennis, verified June 14, 1907, the affidavit of Richard A. Rendick, verified June 14, 1907, the affidavit of James F. Fisher, verified June 14, 1907, and the notice thereto annexed, and the affidavit of Samuel E. Kelly, verified June 14, 1907, and it appearing that said petition, and the papers upon which it was based, was served on the Federal Brewing Company on June 20, 1907, and after hearing Francis A. McCloskey, Esq., of counsel for James J. Ennis, in support of said motion, and Thaddeus D. Kenneson, of counsel, in opposition to said motion, and the Federal Brewing Company opposing said application on the ground that it was not made within the time within which such an application must be made under the statutes of the State of New York, and due deliberation having been had, now, on motion of Francis A. McCloskey, Esq., attorney for James J. Ennis, the petitioner herein, it is

Ordered, that the said motion be and it hereby is in all respects granted; and it is further

Ordered, that John W. Weber, Esq., Samuel S. Whitehouse, Esq., and Julian D. Fairchild, Esq., be and they are hereby appointed appraisers to appraise the value of the stock of the said petitioner and the 31st day of July, 1907, at two o'clock in the afternoon of that day, and such other times as the majority of the said appraisers shall fix, are hereby designated as the time of their proceedings; and that the office of S. S. Whitehouse, Esq., of No. . . Montague street, and such other place or places as the majority of the said appraisers shall fix, are hereby designated as the place of their proceedings; and it is further

Ordered, that any vacancy in the board of appraisers, hereby appointed, occurring by the refusal or neglect to serve, or otherwise, shall be filled by this court upon five (5) days' notice; and it is further

Ordered, that the said appraisers, or any two (2) of them, shall estimate and certify to this court, in writing over their signatures, the value of the petitioner's stock as of the 27th day of April, 1907, the time of the petitioner's dissent; and it is further

Ordered, that the manner in which payment of the said stock shall be made by the said Federal Brewing Company to the said petitioner is hereby directed to be in cash within fifteen (15) days after the confirmation or approval by this court of the report, estimate and certificate of the said board of appraisers; and it is further

Ordered, that the board of appraisers shall deliver one (1) copy of their report, estimate and certificate to the Federal Brewing Company, and another to the petitioner; and it is further

Ordered, that the charges and expenses of the said board of appraisers shall be taxed under the direction of this court, and shall be paid by the Federal Brewing Company, and it is further

Ordered, that when the said Federal Brewing Company shall have paid the amount of such appraisal, together with the costs, charges and expenses herein provided, the petitioner shall cease to have any interest in the stock described in the said petition, and in the corporate property of the said Federal Brewing Company, and that the said stock may be held and disposed of by the said Federal Brewing Company; and it is further

Ordered, that the petitioner and the board of appraisers may apply at the foot of this order for any other relief as may be just and proper; and it is further

Ordered, that all proceedings on the part of the petitioner under this order shall be and they hereby are stayed pending the determination by the Appellate Division of the Supreme Court, second department, of an appeal from this order, by the Federal Brewing Company; provided, however, that this stay may be vacated unless the Federal Brewing Company shall take an appeal, perfect the same and place the same for argument upon the first calendar for appeals from orders during the October, 1907, term of said Appellate Division.

Enter:

S. T. M.,
Justice Supreme Court.

Granted, *July 11, 1907*, CHAS. T. HARTZHEIM, *Clerk.*

The foregoing order was affirmed by said Appellate Division on the 10th day of January, 1908, and by the Court of Appeals on the 2d day of June, 1908. *Matter of Ennis v. Federal Brewing Co.*, 123 App. Div. 691, 192 N. Y. 570.

CORPORATIONS, DISSOLUTION OF (VOLUNTARY).

GENERAL CORPORATION LAW. §§ 104, 105, 170-195, 225, 305, 312, 314-316.

ARTICLE.

I. GENERAL CORPORATION LAW. §§ 170-173, 195, 818.

Subd. 1. The proceeding strictly statutory, 818.

Subd. 2. Proceedings for dissolution by directors and stockholders, 821.

§ 170. *Petition for voluntary dissolution of corporation, 821.*

§ 171. *Directors or trustees may be required to petition, 821.*

§ 172. *Petition when directors or trustees do not agree, 821.*

Subd. 3. Voluntary dissolution of corporations other than as provided for by Article 9, 824.

§ 173. *Corporation excepted from two preceding sections, 824.*

§ 195. *Exception of certain corporations, 824.*

II. PETITION, SCHEDULE AND AFFIDAVIT. §§ 174, 175, 825.

§ 174. *Contents of petition, 825.*

§ 175. *Affidavit to be annexed to petition, 825.*

III. PRESENTATION OF PETITION AND ORDER THEREON. §§ 176, 178-181, 827.

§ 176. *Presentation of petition, 827.*

§ 178. *Action by court upon petition for dissolution, 827.*

§ 179. *Publication of order to show cause why corporation should not be dissolved, 827.*

§ 180. *Service of order to show cause, 827.*

§ 181. *Entering and filing order and papers, 828.*

IV. TEMPORARY RECEIVER AND INJUNCTION. §§ 104, 105, 182, 183, 225, Rule 80, 830.

Subd. 1. Temporary receiver, 830.

§ 104. *Temporary receiver, 831.*

§ 105. *Additional powers and duties of temporary receiver, 832.*

§ 182. *Temporary receiver, 831.*

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VI. FINAL ORDER AND ITS EFFECT. § 190, 839.

§ 190. *Final order, 839.*

VII. PERMANENT RECEIVER. §§ 191-194, 846.§ 191. *Permanent receiver*, 846.§ 192. *Appointment of director, trustee, or other officer or stockholder as receiver*, 847.§ 193. *Certain sales, transfers, and judgments void*, 847.§ 194. *Omission, defect, or default of receiver*, 847.**VIII. MISCELLANEOUS PROVISIONS AND MATTERS OF PRACTICE.**

§§ 177, 189, 312, 314-316, 847.

§ 177. *Corporations without stockholders*, 847.§ 189. *Amending papers*, 848.§ 312. *Service of papers upon Attorney-General*, 848.§ 314. *Application to the court in certain actions and proceedings*, 849.§ 315. *County wherein action may be brought by Attorney-General on behalf of the people*, 849.§ 316. *Preferences in actions or proceedings by or against receivers*, 849.**IX. APPEALS. 853.****X. PRECEDENTS. 853.**

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SECTIONS OF GENERAL CORPORATION LAW AND WHERE FOUND.

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The Consolidated Statutes, Article 9, General Corporation Law (L. 1909, Ch. 28), contain the provisions relative to "Voluntary Dissolution of Corporations" theretofore contained in the Code.

There is no change in substance but part of section 1, chapter 378, Laws of 1883, is inserted as section 183 in the present statute.

The following table shows in numerical order the sections of the Code (and of a single statute), followed by the section of the General Corporation Law in which each section has been embodied. This table is intended to enable the practitioner who is somewhat familiar with the Code provision on this subject, and the arrangement of the sections, to ascertain readily where the corresponding provision is to be found in the Consolidated Statutes:

Code.	General Corporation Law.	Code.	General Corporation Law.
Sec. 2419.....	To Sec. 170	L. 1883, Chap. 378, sec. 1 in part	To Sec. 183
2420.....	171	Sec. 2423.....	184
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ARTICLE I.

GENERAL CORPORATION LAW. §§ 170-173, 195.

Subd. 1. The proceeding strictly statutory, 818.

Subd. 2. Proceedings for dissolution by directors and stockholders, 821.

§ 170. *Petition for voluntary dissolution of corporation, 821.*

§ 171. *Directors or trustees may be required to petition, 821.*

§ 172. *Petition when directors or trustees do not agree, 821.*

Subd. 3. Voluntary dissolution of corporations other than as provided for by Article 9, 824.

§ 173. *Corporation excepted from two preceding sections, 824.*

§ 195. *Exceptions of certain corporations, 824.*

Subd. 1. The Proceeding Strictly Statutory.

The manner in which a corporation may be dissolved is said (1 Bl. Com. 485) to be either: First, by act of Parliament; second, by the natural death of all its members; third, by surrender of its franchises; fourth, by forfeiture of its charter. The manner of dissolution of a corporation is classified in *Am. & Eng. Enc. of Law*: First, by expiration of the time limited in the charter; second, upon the happening of a contingency prescribed by the charter; third, by the surrender of the franchises to the State; fourth, by act of the Legislature; fifth, by failure of an integral part of the corporation; sixth, by forfeiture of the franchise in a proper judicial proceeding. To the same effect *Thompson on Corporations*, § 6577; *Spelling on Corporations*, § 1008. The subject is very fully discussed in *People v. O'Brien*, 111 N. Y. 1, in an action brought by the Attorney-General.

The dissolution of a corporation is the termination of the existence of the corporate franchises conferred by the State upon the body of the corporators. *Am. & Eng. Cyc. of Law*, vol. 4. p. 294. The dissolution of a corporation is that condition of law and fact which terminates the capacity of the body corporate to act as such, and necessitates a final liquidation and extinguishment of all the relations subsisting in respect to the corporate enterprise. *Taylor on Corporations*, 309.

The earliest legislation on this subject in this State was in 1817, the history of which is reviewed, opinion, Vann, J., in *Matter of Trustees of Importers & Grocers' Exchange*, 132 N. Y. 212, where it is held that the method prescribed by statute is exclusive and must be substantially followed.

A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed the dissolution. The law made it and the law only can put an end to it. It cannot sell its property in order to deprive itself of existence. Opinion, Vann, J., *People v. Ballard*, 134 N. Y. 269 (294).

Under the provisions of the Code now under consideration, we are only concerned with the dissolution of the corporation by the voluntary surrender of its franchises through a judicial proceeding. This proceeding is entirely a matter of statute, and being special and statutory must conform to the statute, although instituted in a court of general jurisdiction. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of Westchester Iron Co.*, 15 How. 7. A court of equity has not, by virtue of its general and inherent powers, the right to dissolve the corporation, such right being entirely statutory. *Blivin v. Peru Iron & Steel Co.*, 9 Abb. N. C. 205.

A corporation may be dissolved by the surrender of its charter, and its acceptance by the State, but it cannot be held to be actually dissolved until so adjudged and determined, either by judicial sentence or sovereign power; and a court of equity has not, by virtue of its general inherent powers, the right to dissolve a corporation; such power is entirely statutory and can only be exercised in a manner sanctioned by the Legislature. *Magee v. Genesee Academy*, 17 St. Rep. 221, citing *Kincaid v. Dwinelle*, 58 N. Y. 543; *Denike v. N. Y. & Rosendale Lime Co.*, 80 N. Y. 599.

The authority of the court in this proceeding must be found in the statute and not in its general equitable powers, since the proceeding is purely statutory, and the court has no power except as conferred by statute, which must be strictly pursued. *Matter of Binghamton G. E. Co.*, 143 N. Y. 261 (264); *Matter of Dolgeville El. & P. Co.*, 160 N. Y. 500 (502); *Matter of Malcolm Brewing Co.*, 78 App. Div. 592.

The proceeding is a purely statutory one and while the court acquires jurisdiction by filing a petition, it has no power or authority to take any other step than such as is conferred by statute. *Matter of Simonds Mfg. Co.*, 39 App. Div. 576 (579), 57 Supp. 776.

A corporation can only be dissolved by a judicial sentence or a surrender of its charter accepted by the State. (*Ex parte Reformed Presbyterian Church*, 7 How. 476; *N. Y. Marbled Iron Wks. v. Smith*, 4 Duer, 362), and a corporation omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate

character. *Day v. Ogdensburg, etc., R. R. Co.*, 11 St. Rep. 335, 107 N. Y. 129, rev'g 4 St. Rep. 772. Under the Code the court has no power to dissolve a corporation and appoint a receiver of its assets even upon petition of all the stockholders together with its creditors; the proper remedy is to proceed under the statute, and an order dissolving a corporation and appointing a receiver upon such application, when all parties and the Attorney-General were represented in court and no objection was made, was vacated on motion of the Attorney-General, on the ground that the court had no power to make such an order. *Matter of the Mart*, 5 Supp. 82.

There is no obligation to the State or to the public imposed upon a private manufacturing corporation to carry on a business for which it was formed; it may at any time put an end to its transactions and voluntarily wind up its affairs. *Skinner v. Smith*, 56 Hun, 437, 31 St. Rep. 448, 10 Supp. 81; aff'd, 134 N. Y. 240, 47 St. Rep. 528, holding that a manufacturing corporation may discontinue its operations when unprofitable, for the purpose of protecting its shareholders from further loss. See, however, *People v. Ballard*, 136 N. Y. 639; referred to in *Vanderpoel v. Gorman*, 140 N. Y. 563, 56 St. Rep. 503.

It was held in *Matter of Niagara Ins. Co.*, 1 Paige, 258, that under the then existing statute the court would not decree a dissolution of the corporation simply upon request of a majority of the directors and stockholders. But see language of this section and section 2429. It was further held in that case that where the owners of a large proportion of the stock found it to their interest to withdraw their capital, it will be deemed presumptive evidence that the interest of the stockholders generally will be promoted by a dissolution of the corporation. The omission of a railroad company to elect officers, sale of its assets, and failure to do business does not work a dissolution of a corporation; in order to do that there must be a surrender of its charter to, and acceptance by, the State, or judgment of dissolution. *Allen v. N. J. Southern R. R. Co.*, 49 How. 14. And a number of cases are cited to sustain the proposition. However, in *Webster v. Turner*, 12 Hun, 264, it is said, all concurring, that when a corporation, with the consent and approval of all its stockholders, sold its entire property and effects with the intent and for the purpose of discontinuing the business of the corporation, and declared itself dissolved, did no business afterward, held no meetings, and owned no debts, these acts were equivalent to a surrender of its corporate rights, citing numerous cases. And in *Erwin v. The Oregon Steam Nav. Co.*, 22 Hun, 598, it is held that the only effect of a resolution dissolving a corporation would be to deprive the corporation of the power of engaging in new business, and to leave it clothed with full power, so far as necessary, to close up all its affairs, pay all its debts, and distribute all its

property. It is held in *Denike v. N. Y. & R., etc., Co.*, 80 N. Y. 599, that all the stockholders uniting might undoubtedly surrender the franchises of the corporation and work its dissolution, but that a portion of them cannot do so in the absence of statutory authority.

Subd. 2. Proceedings for Dissolution by Directors and Stockholders. §§ 170-172.

§ 170 (Formerly Code, § 2419). Petition for voluntary dissolution of corporation.

If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the State, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article.

§ 171 (Formerly Code, § 2420). Directors or trustees may be required to petition.

It shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this state to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders.

§ 172 (Formerly Code, § 2420). Petition when directors or trustees do not agree.

If a corporation, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in section one hundred and seventy of this chapter.

Directors of a corporation have the legal power to commence proceedings for a voluntary dissolution, and it is their duty to do so, if for any reason they deem it beneficial to the interests of the stockholders that the corporation should be dissolved. It is not necessary that the corporation should be insolvent in order to justify the proceedings for dissolution and the final dissolution of the corporation. So held where a corporation had concededly been losing their money every year for the last ten years, and the dividends had, during that whole time, been paid, not from the net earnings of the company, but from the surplus on hand. *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 Supp. 15, 78 St. Rep. 15.

It was held, in *Matter of Petition for the Dissolution of the Sportsmen's Assoc.*, 17 St. Rep. 879, 15 Civ. Pro. 215, 2 Supp. 63, that the provisions of the Code as to the voluntary dissolution of a corporation applied only to corporations organized for the purposes of trade, business, and profit, and not to those of a social character. In *Matter of American Dramatic Fund Assoc.*, 22 Abb. N. C. 231, 3 Supp. 793, it was held that the Code provisions applied to all corporations, except to an incorporated

library society, to a religious corporation, or to a select school or academy incorporated by the Regents of the University, or by the Legislature, or to a municipal or other political corporation, all of which are exempted from the provisions of section 2419 by section 2431; that the corporations whose object is the constitution and administration of a fund for the payment of annuities and allowances to members and beneficiaries, and for the burial of those entitled to interment under its by-laws or regulations, are within the provisions of the Code, and further that the property of such corporation may be distributed according to a plan approved by the members of the association; and it is not an objection to dissolution, that owing to the nature of the corporation some of the details prescribed by statute, as to distribution by receiver, cannot be carried out.

A corporation organized under chapter 228, Laws of 1877, providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business, because of the diverse interests of its members, although the corporation is solvent, and the minority of the trustees and members oppose the dissolution. When it appears that the interests of the stockholders of such a corporation are so discordant as to prevent efficient management, and that the large majority of its trustees and members wish to wind up its affairs by dissolution, the fact is established that the dissolution will be for the interests of the stockholders. *Matter of Application of Trustees of the Importers & Grocers' Exchange for a Voluntary Dissolution*, 132 N. Y. 212, 43 St. Rep. 625, aff'g 15 Daly, 419, 28 St. Rep. 446, 8 Supp. 322, which rev'd 18 St. Rep. 175, 2 Supp. 257.

When the stock, effects, and property of a corporation are not sufficient to pay all of its just demands or to afford a reasonable security to those who deal with it, or if for any other reason the interests of the stockholders require it, the officers of the corporation may ask for its dissolution and for the appointment of a receiver under proceedings for a voluntary dissolution, in which case the officers are not required to resign, but the action is instituted in their official capacity. *Zeltner v. Zeltner Brewing Co.*, 174 N. Y. 247, aff'g 79 App. Div. 136, 80 Supp. 338.

Where stockholders elect directors with knowledge that they were not stockholders in fact, but merely of record, such directors may join in a petition for the voluntary dissolution of the corporation. *Matter of Manoca Temple Assoc.*, 128 App. Div. 796.

Newly-elected directors of a manufacturing stock corporation have a right to stop voluntary proceedings for the dissolution of the corporation which have been initiated by their predecessors in office. *Matter of David Jones Co.*, 67 Hun, 360, 22 Supp. 318.

No meeting of the board of trustees of a religious society is necessary to authorize the application of a majority of the trustees for a dissolution of the society under the Laws of 1872, chapter 424. Nor is it essential that there should be a meeting of the society to authorize such an application, except to show the court that a dissolution is favored by a majority of the society. *Matter of Third Meth. Epis. Ch.*, 67 Hun, 86, 51 St. Rep. 406, 21 Supp. 1105; aff'd, 142 N. Y. 638.

The right and power conferred upon the officers of an insolvent corporation to prosecute a proceeding for the voluntary dissolution and distribution of its property, through the medium of receivers, among those entitled to receive it, is permissive merely, and cannot be construed as a surrender by the State of its right to enforce a forfeiture of the charter of the corporation whenever it sees fit to do so. Where, in an action brought by the Attorney-General to obtain a judgment dissolving a banking corporation, he alleged that it was insolvent, had suspended its ordinary business, and that the Superintendent of Banks had taken possession of its property, and the answer did not deny the insolvency, but alleged as a separate defense that, prior to the commencement of the action, proceedings had been taken for a voluntary dissolution of the corporation, it was held that the pendency of such proceedings was not a bar to the maintenance of the action by the Attorney-General. *People v. Murray Hill Bank*, 10 App. Div. 328, 75 St. Rep. 1203, 41 Supp. 804. It was subsequently held in connection with the same proceedings that the proceeding for a voluntary dissolution abated by the entry of the judgment of dissolution of the corporation in an action brought by the Attorney-General. *Matter of Murray Hill Bank*, 14 App. Div. 318. On appeal, 153 N. Y. 199, it was held, affirming the Appellate Division, that after the Superintendent of Banks has taken possession of the assets of the insolvent banking corporation, with the intention of having an action brought by the Attorney-General to dissolve the same, the directors cannot anticipate such action on the part of the State by instituting a proceeding for voluntary dissolution, and that an action for involuntary dissolution by the Attorney-General in the name of the people under the Banking Law, and under the law, begun after the special proceeding, takes the priority, and that the provisions of the Banking Law, being the special and later statute, are paramount and inconsistent with the Code. See *Matter of Murray Hill Bank*, 9 App. Div. 546, 41 N. Y. Supp. 914.

When the charter provided that the corporation might discontinue business when stockholders owning two-thirds of the capital stock should vote to do so, it was held such a vote was effectual, but that the corporate existence continued for the purpose of closing its affairs. *Green v. Seymour*, 3 Sandf. Ch. 285. A decree for dissolution in an action by a stockholder or creditor, who is also the president, and in a case not authorized by

statute, cannot be sustained, although consented to by the president and by one or more of the trustees individually, for an application for a voluntary dissolution must proceed from the company or its board of trustees. *Blevin v. Penn Steel & Iron Co.*, 9 Abb. N. C. 205. But a judgment in an action brought by the Attorney-General is not invalidated by the consent of the company. *People v. Globe Ins. Co.*, 60 How. 52.

Subd. 3. Voluntary Dissolution of Corporations Other than as Provided for by Article 9. §§ 173, 195.

§ 173 (Formerly Code, § 2420). Corporation excepted from two preceding sections.

Sections one hundred and seventy-one and one hundred and seventy-two of this chapter do not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

§ 195 (Formerly Code, § 2431). Exception of certain corporations.

This article does not apply to an incorporated library society, to a religious corporation, or to a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation.

The method of abolishing a library is provided for in the Education Law, section 1044. It involves the action of the parties interested therein and the Regents of the University, and no order or direction by the court is necessary.

An incorporated academy may be dissolved in the manner prescribed by the various subdivisions of section 1102 of the Education Law. This proceeding does not in any wise involve the intervention of or action by any court.

The Banking Law, section 99, provides for the manner in which the stockholders of a bank may wind up its affairs by a two-thirds vote. Upon notice to the Superintendent of Banks of such action, the Supreme Court may make an order declaring the business of the bank closed, and finally make an order declaring it dissolved.

The Business Corporations Law, section 5, declares that unless one-half of the capital stock of such a corporation is paid in within one year the corporation shall be dissolved. It would appear, from the authorities on the general subject of forfeiture of corporate rights and powers, at least questionable whether this provision is self-executing. See *People ex rel. Hearst v. Ramapo Water Co.*, 51 App. Div. 145, 64 Supp. 532; *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540.

Articles 6 and 7 of the General Corporation Law provide for proceedings by action for the sequestration, dissolution, or annulment of corporation, and article 8 for the dissolution of a moneyed corporation. These actions are treated as "special actions" in the work on that topic.

The procedure upon dissolution of religious corporations is provided for by section 18 of the Religious Corporation Law; whenever a religious

corporation "shall cease to act in its corporate capacity and keep up religious services," the Supreme Court is authorized, as therein provided, to decree its dissolution and order a sale of its property.

Dissolution of a stock corporation, both before beginning business and before expiration of time limited in its certificate of incorporation or charter, is provided for by sections 220 and 221, of article 10 of the General Corporation Law. This may be done by voluntary action out of court by the incorporators or stockholders.

Revisers' note to Article 10. These proceedings for the voluntary dissolution of stock corporations have been transferred to the General Corporation Law from the Stock Corporation Law in order to bring together so far as possible all proceedings and actions relating to the winding up of a corporation.

ARTICLE II.

PETITION, SCHEDULE, AND AFFIDAVIT. §§ 174, 175.

§ 174. *Contents of petition, 825.*

§ 175. *Affidavit to be annexed to petition, 825.*

§ 174 (Formerly Code, § 2421). *Contents of petition.*

The petition must show that the case is one of those specified in sections one hundred and seventy and one hundred and seventy-two of this chapter, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against the corporation.
2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.
3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.
4. A statement of the true cause and consideration of the indebtedness to each creditor.
5. A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.
6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.
7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon.

§ 175 (Formerly Code, § 2422). *Affidavit to be annexed to petition.*

An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

The petition for the dissolution of a corporation must fully conform to the statute in every particular. *Ex parte Dubois*, 15 How. 7, 6 Abb. Pr. 386.

To empower the Supreme Court to entertain a proceeding for the voluntary dissolution of a corporation, the petition presented must have been

verified by a majority of the directors, in strict pursuance of the statute. *Matter of Dolgeville El. L. & P. Co.*, 160 N. Y. 500.

Where there is no allegation of actual insolvency, the pendency of dissolution proceedings should not be allowed to interfere with the efforts of a board of directors recently elected to put the corporation on a firm basis, and an injunction to that end should not be granted. *Matter of Colton*, 26 Misc. 571, 57 Supp. 556.

Under the former statute it was held that the petition should contain a statement of the books, vouchers, and securities, relating to the corporation, of the incumbrances on its property, the nature of the debt or demand due the several creditors, and the true cause and consideration of such indebtedness; that the stock not issued to the stockholders named is still owned by or in the possession of the corporation, or that it has not been issued, and the property should be fully described. Such an inventory and a full statement of the books, vouchers, and securities relating to the property will be required for the benefit of the receiver. Where it appeared by the petition and proof that one-half of the shares of the corporate stock was owned by the petitioners, who were two of the trustees of the company proceeded against, and the other half was owned by individuals, appellants, and these parties differed concerning the management of the company, but it was not clearly stated why the company should be dissolved, the petition was held defective. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

Under the statute requiring a full, just, and true inventory of all the property of, and the statement of all the books, vouchers, and securities relating to, the corporation to be annexed to a petition for the voluntary dissolution thereof, if an omission exists and does not show lack of good faith, nor afford evidence of a fraudulent purpose, an objection thereto does not go to the jurisdiction of the court, and may be obviated by evidence. *Matter of Santa Eulalia Silver Mining Co.*, 21 St. Rep. 89, aff'g 2 Supp. 221.

Statements contained in the moving papers, used upon the application for such an order, showing that notes of the corporation had gone to protest, that suits to which the corporation had no defense were pending upon overdue claims exceeding in the aggregate \$30,000, and that other creditors were threatening to sue and that the company's assets amounted only to a few thousand dollars and a heavily mortgaged apartment-house, are sufficient to warrant a finding that the corporation was insolvent within the meaning of section 2419 of the Code of Civil Procedure.

In such a case the order granting the application is not void because it fails to recite that insolvency has been shown to the satisfaction of the court, as the court, having acquired jurisdiction, can correct such defect *nunc pro tunc*. *Matter of Lenox Corp.*, 57 App. Div. 515, 68 Supp. 103; aff'd, 167 N. Y. 623.

It should be stated in the schedule that the stock not stated to be issued to the stockholders named is still owned by, or at least that it has not been issued. The property ought to be identified in the inventory, and to be so fully described, as, if it be lands, by metes and bounds, or by references to conveyances or otherwise, that the receiver may be enabled to take possession of the property. Such an inventory, and a full statement of the books, vouchers, and securities relating to the property will be required, in order to put it in the power of the receiver to be certain that he has received all the property, and to bring such actions, or take such other steps as may be necessary to pay the liabilities of the company. *Matter of Westchester Iron Co.*, 15 How. 7.

The provision of section 2421 is complied with where the schedule to such a petition by the directors of a bank, whose property is in the possession of the Superintendent of Banks, states that it contains the required matter so far as known, and that there are "a number of other depositors whose names are unknown to petitioners," and gives the aggregate claims of all depositors. *Matter of Directors of Murray Hill Bank*, 9 App. Div. 546, 41 Supp. 914.

ARTICLE III.

PRESENTATION OF PETITION AND ORDER THEREON. §§ 176, 178-181.

§ 176. *Presentation of petition*, 827.

§ 178. *Action by court upon petition for dissolution*, 827.

§ 179. *Publication of order to show cause why corporation should not be dissolved*, 827.

§ 180. *Service of order to show cause*, 827.

§ 181. *Entering and filing order and papers*, 828.

§ 176 (Formerly Code, § 2423). *Presentation of petition.*

The papers must be presented at a special term of the Supreme Court, held within the judicial district, embracing the county wherein the principal office of the corporation is located.

§ 178 (Formerly Code, § 2423). *Action by court upon petition for dissolution.*

In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section one hundred and seventy of this chapter, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved.

§ 179 (Formerly Code, § 2424). *Publication of order to show cause why corporation should not be dissolved.*

A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

§ 180 (Formerly Code, § 2425). *Service of order to show cause.*

A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an

engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, or at least ten days before the time appointed for the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

§ 181 (Formerly Code, § 2423). Entering and filing order and papers.

The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located.

In *Olmstead v. Rochester & Pittsburg R. R. Co.*, 8 St. Rep. 856, it was held that the principal business office of the company is at the place specified in its articles and its by-laws and reports, where all its books of transfer, stock-books, and accounts of receipts and disbursements are kept, and the election of directors held.

The order to show cause is process for the purpose of bringing interested persons before the court, and there must be a strict compliance with the statutory provisions. Where the only requirement of the order was that persons interested "show cause why the prayer of the petition should not be granted," it was held to be neither in substance or effect what the law required. That as the Code required every person interested to be apprised of the fact that the proceeding was to dissolve the corporation, and the order failed to give such information, the proceeding was void for lack of jurisdiction, and that the objection might be taken by any party to the proceeding at any stage thereof. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

Where a perusal of the order would not inform either the creditors or stockholders that the dissolution of the corporation was demanded or contemplated by the proceedings, the order was void, and the court did not acquire complete jurisdiction over the proceedings sought to be instituted by the board of directors. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 5 Supp. 136, 17 Civ. Pro. 130, following *Matter of Pyrolusite Mfg. Co.*, 3 Civ. Pro. 270, 29 Hun, 429.

An application prayed for a dissolution of the corporation; the order granted thereon was entitled "In the Matter of the Application of the Directors" of the corporation for a voluntary dissolution. The order recited that the corporation was insolvent, and required all persons interested to show cause why the prayer of the petitioner should not be granted. *Held*, that this was substantially a requirement to show cause "why the corporation should not be dissolved," and so was sufficient in this particular; and where an order did not direct publication and did not specify the newspapers in which publication was to be made, as required, it was said that, while it was a defect, it was not one which rendered the appointment of the receiver a nullity; also that the court having jurisdiction of the

proceedings had authority to make an order *nunc pro tunc* correcting the defect. *Matter of the Christian Jensen Co.*, 128 N. Y. 550, 40 St. Rep. 621, 27 Abb. N. C. 303, aff'g 59 Super. Ct. 552, 39 St. Rep. 379, 15 Supp. 144. It is said, in *Matter of Westchester Iron Co.*, 15 How. 7, n., that the order should be published in the county where the principal office is situated.

The requirement of section 8, chapter 378, of the Laws of 1883, that a copy of all motions and of motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, shall, in every action for the dissolution of a corporation, be served on the Attorney-General, applies to proceedings for the voluntary dissolution of corporations, and the purpose of the statute is to require notice to be given to the Attorney-General of the time and place when the petition will be presented to the court, so that he may present and be heard upon an initiatory application, as well as all the other proceedings to be had in the matter, and unless such notice is served or waived the court has no jurisdiction to entertain the proceedings, and the order is void. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 17 Civ. Pro. 130. It seems that the requirements of the statute with reference to service of notice upon the Attorney-General in proceedings for the dissolution of a corporation may be satisfied by the acceptance of short notice. *Matter of Peekamose Fishing Club*, 151 N. Y. 511, dism'g appeals, 5 App. Div. 283 (284), 8 App. Div. 617.

The Attorney-General must be given notice of an application, made under section 2419 of the Code of Civil Procedure, for the voluntary dissolution of a corporation, whether the corporation is solvent or insolvent, and the court may vacate an order to show cause why the corporation should not be dissolved, granted without such notice.

The fact that the court had not power to make such order does not prevent it subsequently vacating it. *Matter of Broadway Ins. Co.*, 23 App. Div. 282, 48 Supp. 299.

Where the Attorney-General has not been served with the papers in a proceeding for the voluntary dissolution of a corporation, as required by section 8 of chapter 378 of the Laws of 1883 (see section 312, General Corporation Law), he cannot, after a motion made, validate the proceeding or vest the court with jurisdiction by admitting due and timely service of notice of motion, or by signing waivers antedating the order.

It seems, however, that he can confer jurisdiction by waiving service before the motion is brought to a hearing. *Matter of Strong Co.*, 128 App. Div. 208, 112 Supp. 557.

An order appointing a temporary receiver, made after the presentation of the petition and on proper notice to the Attorney-General, is valid, for it is not necessary that it should be preceded by a valid order to show cause why the corporation should not be dissolved.

Proceedings for the voluntary dissolution of a corporation are purely statutory, and non-compliance with the express requirements of the statute in connection with the institution and maintenance of such proceedings is jurisdictional.

Where no notice of a presentation of the petition and schedules, nor of the application for an order to show cause why a corporation should not be dissolved, nor any copy of the motion papers nor of the proposed order was served on the Attorney-General, the order to show cause and all proceedings under it are void. *Knickerbocker Trust Co. v. Tarrytown W. P. & M. R. Co.*, 133 App. Div. 285, 117 Supp. 871.

ARTICLE IV.

TEMPORARY RECEIVER AND INJUNCTION.* §§ 104, 105, 182-184, 225, 305, Rule 80.

Subd. 1. Temporary receiver, 830.

§ 104. *Temporary receiver*, 831.

§ 105. *Additional powers and duties of temporary receiver*, 832.

§ 182. *Temporary receiver*, 831.

§ 183. *Application for appointment of receiver*, 830.

§ 225. *Security*, 832.

Rule 80. *Sequestration of property of corporation; where motion for receiver may be made; removal of receiver*, 830.

Subd. 2. Injunction, 837.

§ 184. *Injunction*, 837.

§ 305. *Requisites of injunction against corporation in certain cases*, 837.

Subd. 1. Temporary Receiver. §§ 104, 105, 182, 183, 225, Rule 80.

§ 183. *Application for appointment of receiver.*

Every application made for the appointment of a receiver of a corporation other than applications made by the attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located.

Consolidators' note to § 183. The statute of 1883, a portion of which is here consolidated, applies to proceedings for the voluntary dissolution of a corporation. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 175. See also *U. S. Trust Co. v. N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 478; *McNabb v. Porter Air Lighter Co.*, 44 App. Div. 103; *Matter of Broadway Insurance Co.*, 23 App. Div. 282. A more general provision relating to applications for the appointment of receivers and otherwise will be found in section 314 under the head of provisions applicable to more than two of the actions or proceedings incorporated in this chapter.

Rule 80. Sequestration of property of corporation; where motion for receiver may be made; removal of receiver.

All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the attorney-general in behalf of the people of this state, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one

* The powers and duties of receivers both temporary and permanent are fully considered under title "Corporations, Receivers of" in so far as they relate to receivers in voluntary dissolution.

may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

§ 182 (Formerly Code, § 2423). Temporary receiver.

If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding, after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

Consolidators' note to § 182. This section provides for the powers and duties of a temporary receiver and makes applicable to a temporary receiver appointed in proceedings for the voluntary dissolution of a corporation the powers and duties of a temporary receiver appointed in an action for sequestration and for the dissolution of a corporation. This was accomplished by the reference to section 1788 of the Code of Civil Procedure, which reference has been changed to section 105 of this chapter where section 1788 of the Code has been incorporated in this chapter. The powers and duties of a temporary receiver are not defined to any large extent by statute, but are mainly matters of judicial discretion. The powers, duties and liabilities of receivers consolidated in article 2 of this chapter apply only to permanent receivers. For a note on the subject see 19 Abb. N. C. 359.

It will be noted that under section 182 a temporary receiver appointed in this proceeding "shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action under section 104 of this chapter." Section 104 is derived from and is section 1788 in part, the remainder of section 1788 being section 106 of the General Corporation Law. The note by the consolidators to section 182 refers to section 105 of the General Corporation Law, stating that section 1788 has been incorporated in that section. This appears to be an error, since it is stated in the report of the Board of Statutory Consolidation, volume 2, page 2201, that section 105 is derived from section 1789. Section 105 gives additional powers and duties to the temporary receiver. *Quære*, as to whether those powers and duties devolve upon the temporary receiver under section 182, *supra*, since that section is not referred to in section 105. Section 182 was derived from the Code of Civil Procedure, section 2423.

§ 104. Temporary receiver.

In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is entered. A temporary

receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof.

§ 105. Additional powers and duties of temporary receiver.

A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.

§ 225. Security.

A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same.

It will be noted that under section 105 the court may confer upon the temporary receiver the powers and authority and subject him to the duties and liabilities of a permanent receiver with a single exception. For this reason it is difficult to separate the functions of the temporary and permanent receiver in the collation of authorities, since the extent and nature of the powers of a permanent receiver is often considered where the temporary receiver has been clothed with the duties appertaining to the former.

A temporary receiver should not be appointed on the voluntary dissolution of a corporation without a full hearing of persons representing the majority interests of stockholders and creditors. *Matter of Manoca Temple Assoc.*, 128 App. Div. 796, 113 Supp. 172.

A temporary receiver, as such, has no authority to continue the business of a concern, and, unless he is authorized to do so by the court, the estate cannot be charged with liability incurred by him in the business. *Appleton v. Welch*, 29 Misc. 343 (344), citing *Meyer v. Lexow*, 1 App. Div. 116; *Sayles v. Jourdan*, 2 N. Y. Supp. 827, 19 St. Rep. 349.

Where the directors of a manufacturing company, in proceedings for voluntary dissolution, applied for the appointment of temporary receivers, and the schedule showed a surplus instead of a deficiency of assets, it was held that no case was made for the appointment of temporary receivers, and the schedules were not allowed to be amended so as to decrease

the amount of assets. *Matter of Hitchcock Mfg. Co.*, 1 App. Div. 164, 73 St. Rep. 46, 37 Supp. 834.

By the proper presentation to a State court, after due notice of the application, of a petition praying for the dissolution of a corporation and upon the appointment of a receiver, the court acquires jurisdiction of the subject-matter, and although the receiver has not actually taken the property of the corporation into his manual possession, the jurisdiction of the court over it is exclusive. The appointment of the receiver is completed by the filing and entering of the order appointing him, although he may be directed to execute and file a proper bond before he proceeds to discharge his duties; when that is done he can take actual manual possession of the property and his title relates back to the date of appointment. *Matter of Schuyler, S. T. B. Co.*, 136 N. Y. 169; rev'd, 154 U. S. 256, under the title of *Moran v. Sturges*, upon the ground that the State court had no jurisdiction as to maritime liens, and was incapable of displacing them; that the District Court of the United States had such jurisdiction, and that the judgment under review was an unlawful interference with proceedings in that court.

The sole authority for appointing a temporary receiver and granting an injunction, enjoining creditors from prosecuting their claims at the commencement of a proceeding for the voluntary dissolution of a corporation, is that conferred by section 2423 of the Code of Civil Procedure (see sections 182, 184), and if the statutory authority is not followed strictly the order will be void.

If there is any evidence tending to show the requisite facts giving the court jurisdiction, the order is not a nullity, although it may have been inprovidently granted and may be set aside on a motion timely made for that purpose. *Matter of Lenox Corp.*, 57 App. Div. 515, 68 Supp. 103; aff'd, 167 N. Y. 623.

Upon an application for a voluntary dissolution of a corporation, under the provisions of the Code, the court acquires jurisdiction upon a petition properly presented, and by the appointment of a receiver the property of a corporation comes into its possession, and it has power to preserve and protect it. For this purpose it may prohibit any interference therewith in any action thereafter instituted. Even if the order granted upon the petition is in some respects irregular, imperfect, and informal, it is not, because of this, a nullity. While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment. Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver. *Matter of Christian Jensen Co.*, 128 N. Y. 556.

Upon the filing of the temporary receiver's bond, his right to possession of the property of the corporation relates back to the time when the order appointing him and enjoining creditors from prosecuting their claims was entered, and a judgment creditor, whose execution is delivered to the sheriff after the entry of such order, but before the filing of the receiver's bond, acquires no lien thereon. *Matter of Lenox Corp.*, 57 App. Div. 515, 68 Supp. 103; aff'd, 167 N. Y. 623.

Temporary receivers appointed in an action for dissolution which abates upon entry of judgment in a similar action in another department are bound to protect the assets which they have received until taken from their possession by order of the court, but have no power to take assets of the corporation away from other persons. *Matter of Murray Hill Bank*, 14 App. Div. 318, 43 Supp. 836; aff'd, 153 N. Y. 199.

A temporary receiver appointed under section 2423 of the Code of Civil Procedure, relating to proceedings for the voluntary dissolution of a corporation, and invested by section 1788 of that Code with power to preserve the property of the corporation and the proceeds of debts and demands collected, may, as auxiliary to such power, be authorized by the court to "finish and complete the outstanding contracts of said company."

Such receiver is not individually liable for material purchased by him in order to complete contracts made by the corporation, where it appears that the material was purchased upon the understanding that it was a liability of the receivership; that it was billed and charged to the receiver in his representative capacity, and that all payments therefor were made by checks signed by him as receiver. *Nason Mfg. Co. v. Garden*, 52 App. Div. 363, 65 Supp. 147.

A receiver of a corporation authorized "to carry on and continue the business" is not individually liable for goods purchased for that purpose. *Olpherts v. Smith*, 54 App. Div. 514, 66 Supp. 976; aff'd without opinion, 173 N. Y. 593.

Where, in proceedings for the voluntary dissolution of a corporation, the temporary receiver of the corporation is made the permanent receiver, an accounting by the temporary receiver to himself as permanent receiver is unnecessary, and an adjudication made upon such an accounting, on notice to the Attorney-General alone, is not binding upon creditors who had not appeared in the proceedings and who received no notice of the accounting; such creditors are, on the accounting of the permanent receiver, entitled to require him to account for everything received by him in his capacity as temporary receiver. *Matter of Simonds Mfg. Co.*, 39 App. Div. 576, 57 Supp. 776.

A court of equity appointing a receiver *pendente lite* can sell the property in the receiver's hands whenever such course becomes necessary to preserve the interests of all the parties. *Porter v. Fraser*, 57 St. Rep. 516,

6 Misc. 557. A temporary receiver is in all respects subject to the control of the court, and such receiver appointed before final judgment has his powers defined by section 1788. *Buckley v. Harrison*, 65 St. Rep. 93, 10 Misc. 683, 31 Supp. 999. A temporary receiver appointed in an action to dissolve a corporation who is not authorized by the court to continue the business or sell the property has no authority to employ a truckman, and the latter cannot maintain an action for wages against him in his representative capacity. *Meyer v. Lexow*, 1 App. Div. 116, 37 N. Y. Supp. 67, 72 St. Rep. 220.

A temporary receiver of a corporation has power to maintain any action or special proceeding for the purpose of collecting, receiving, or preserving the property of the corporation. A proceeding by such receiver to examine a person alleged to have in his possession property to which the receiver is entitled is a special proceeding for the purpose of collecting, receiving, and preserving the property of the corporation and one which the receiver is entitled to maintain. *Rich v. Sargent Granite Co.*, 23 Civ. Pro. 359, 61 St. Rep. 852, 30 Supp. 139.

A temporary receiver of an insolvent corporation, appointed in an action of sequestration, has power under section 1788 of the Code to maintain an action to recover from a third party money collected by the defendant under a judgment entered against the insolvent corporation upon an offer made by it for the purpose of giving an unlawful preference, and the insolvent corporation is not a necessary or proper party defendant to such action. *Nealis as Receiver v. American Tube & Iron Co.*, 150 N. Y. 42, aff'g 76 Hun, 220.

A temporary receiver is an officer and representative of the court and is at all times entitled to its advice and direction. *People v. St. Nicholas Bank*, 76 Hun, 525, 58 St. Rep. 843, 28 Supp. 114. A temporary receiver in sequestration proceedings has power to examine a person alleged to have possession of property that he should take possession of. *Rich v. Sargent*, 61 St. Rep. 852, 30 Supp. 139, 23 Civ. Pro. 35. A receiver should not apply to be authorized to employ any particular attorney. *First Nat. Bank of Rondout v. Navarro*, 43 St. Rep. 813, 17 Supp. 900.

A temporary receiver of a bank has no power without an order of the court to surrender collaterals pledged as security for a loan to offset the amount of the debt against a deposit. His powers are limited by sections 1788 and 1789, which expressly confer upon the court the duty of enlarging them from time to time as the exigencies of the situation may require. *People v. St. Nicholas Bank*, 76 Hun, 522, 58 St. Rep. 843, 28 Supp. 114.

While a temporary receiver in an action to dissolve a corporation is only the custodian of the property, he has an equitable lien or interest in it for the benefit of the creditors, the property being regarded as a trust.

fund of which they are beneficiaries. *Myers v. Myers*, 18 Misc. 663, 43 Supp. 737; aff'd, 15 App. Div. 448, 44 Supp. 513.

A receiver, merely as such, may not disaffirm acts of the corporation whose assets he holds or its directors, if it does not appear that it was insolvent or has creditors to be protected or that those having an equitable interest in the property affected have repudiated the transaction. *Forker v. Brown*, 10 Misc. 169, 62 St. Rep. 480, 30 Supp. 827.

The section defining powers and duties of a temporary receiver appointed in a sequestration action does not necessarily apply to receivers in other actions. The duties and powers of a receiver appointed in an equity action *pendente lite* are not defined by the statute or Code, and are so defined in the appointing order. As an officer of the court the receiver is subject to its direction. One of the main purposes of receiver in any action is to preserve the property so that it will not be less valuable when final judgment is had. *Cobb v. Sweet*, 46 App. Div. 375, 61 Supp. 545.

Any unsecured claims which accrued prior to the appointment of the receiver appointed in the foreclosure action cannot be paid out of the proceeds of the sale of the certificates issued by the temporary receiver, in the absence of the consent of the bondholders, and so far as the order directed this to be done it will be reversed.

In the absence of special equities, the claims against each receiver should be paid out of the property in his hands, and this is so although the same person was receiver in both proceedings.

The issuing of receivers' certificates in railroad and other *quasi* public receiverships, the amount thus raised to have priority over other liens against the property, should be directed only after notice to lienholders and a full hearing and investigation on the merits. *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co.*, 133 App. Div. 285, 117 Supp. 871.

Where, after a trial and decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, the receiver was held to have no authority after entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver. *Colwell v. Garfield Nat. Bank*, 119 N. Y. 408.

While a receiver of a corporation appointed *pendente lite* does not possess all the powers of a permanent receiver, he is just as much the representative of the creditors and shareholders as though his appointment was invested with the quality of permanency; among the duties imposed upon him is that of receiving and preserving the property of the corporation, and his relation to the parties whom he represents is so highly fiduciary as to require of him the exercise of the utmost good faith in all his dealings. *Atkins v. Judson*, 33 App. Div. 42, 53 Supp. 504.

On a motion to vacate the order appointing temporary receivers, it is not permissible to show by the affidavits of directors that the value of the assets shown by the schedule were erroneous, and at the time when the application was made, four months after the proceeding was commenced, that the corporation was insolvent. The amendments to such a schedule permitted by section 2427 contemplated an increase of the schedule, not a decrease. *Matter of Hitchcock Mfg. Co.*, 1 App. Div. 164.

An order granted in a proceeding for the voluntary dissolution of a corporation by a justice of the Supreme Court at his private residence in the city of New York signed "Enter, Wm. N. Cohen, J. S. C.," is an order of a court of record, and does not become operative so as to entitle the receivers appointed thereby to moneys of the corporation on deposit with a bank until it is entered in the county clerk's office. *Wilcox v. Nat. Shoe & Leather Bank*, 67 App. Div. 466, 73 Supp. 900.

A reference is proper to take and state the account of a receiver appointed under section 2429 of the Code of Civil Procedure upon the voluntary dissolution of a corporation. *Matter of Home Book Co.*, 60 Misc. 560, 112 Supp. 1012.

In *Matter of Smith*, 31 App. Div. 39, the court considered that a receiver appointed under section 2423 of the Code of Civil Procedure may "be entitled in an extreme case to 2½ per cent. of the value of the property coming into his hands for receiving and protecting the same." *Moe v. McNally Co.*, 138 App. Div. 480 (487).

Subd. 2. Injunction. §§ 184, 305.

§ 184 (Formerly Code, § 2423). Injunction.

If a temporary receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

§ 305. Requisites of injunction against corporation in certain cases.

An injunction order, suspending the general and ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

In a proceeding for the voluntary dissolution of a corporation, the court may, at the time of appointing the temporary receiver, grant an injunction against the prosecution of suits against the corporation. It is not necessary that the motion for such injunction should be made after the appointment of the receiver. *Matter of Simons Co.*, 41 St. Rep. 355, 16 Supp. 13, dist'g *In re French Mfg. Co.*, 12 Hun, 488, decided under the Revised Statutes. The court has no power in a proceeding for the

voluntary dissolution of a corporation to restrain creditors of the corporation from disposing of its bonds held as collateral to loans under lawful contracts empowering them to sell. The proceeding is purely statutory, and the restraining power of the court is such as given by the Code. The equity power of the court does not extend to the sequestration of the property of the corporation by means of the receiver. *Matter of Binghamton Gen. Elec. Co.*, 143 N. Y. 261, 62 St. Rep. 154.

Where a corporation was not insolvent at the time of the application, no injunction against creditors should have been granted. *Matter of Hitchcock Mfg. Co.*, 1 App. Div. 164. Where a temporary receiver has been appointed in proceedings for voluntary dissolution, the court cannot restrain a suit to foreclose a mortgage given by the corporation to a trust company to secure its bonds. Such an action is not one for the "recovery of a sum of money" within the meaning of the Code. An action for foreclosure is an action in equity, and the fact that, as an incident thereto, the court has jurisdiction, when such relief is asked, to award a judgment for the deficiency, does not alter the character of the action or bring it within section 2423. *Matter of Hamilton Park Co.*, 1 App. Div. 375, 72 St. Rep. 581, 37 Supp. 310.

The power which the court possesses in proceedings for the voluntary dissolution of a corporation is purely statutory and does not depend on its general equity powers.

The injunctive power of the court before the final order in such proceedings is limited to restraining the prosecution of actions for a sum of money only, and the prosecution of a foreclosure action against the property of the corporation cannot be restrained by injunction. *Matter of Tarrytown, W. P. & M. Ry. Co.*, 133 App. Div. 297, 117 Supp. 695.

ARTICLE V.

REFEREE, HEARING AND DECISION. §§ 185-188.

§ 185. *Referee*, 838.

§ 186. *Hearing*, 838.

§ 187. *Decision*, 838.

§ 188. *Use of original papers on hearing*, 839.

§ 185 (Formerly Code, § 2426). **Referee.**

If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable.

§ 186 (Formerly Code, § 2426). **Hearing.**

At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.

§ 187 (Formerly Code, § 2426). **Decision.**

The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

§ 188 (Formerly Code, § 2427). Use of original papers on hearing.

The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

In the report of the referee a bare statement that the schedules annexed to the petition are correct is not a compliance with this section. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429. On the hearing the question as to whether the proceedings are being taken in bad faith and for fraudulent purposes and with intent to defraud the stockholders can be determined, and the dissolution can be opposed upon those grounds. *Jewett v. Swan*, 19 Wkly. Dig. 144.

Where, in a proceeding for the voluntary dissolution of a corporation which has an equal number of trustees equally divided respecting its management, the petitioner neglects or refuses, after the referee has been appointed, to apply for a final order, it is competent for the court, on special application of any person interested, to direct the petitioner to move, so that the interests of all may be protected. If all the parties to such a proceeding appear before the court for the purpose of procuring a final order, the court is authorized to dispose of the matter, although no formal notice has been given to the petitioner. When the petitioner has filed the referee's report, but does not apply for the final order, and all the parties appear before the court on an order obtained by one of them requiring the petitioners and the other parties to show cause why the final hearing should not be had, and the proceeding dismissed and a dissolution denied, the court acquires jurisdiction on notice to the attorney-general to make a final order dissolving the corporation, on the default, on an adjourned day, of the party who moved for a denial of dissolution, where the circumstances show that the motion was in effect and in contemplation of the parties an application for a final hearing of the proceeding upon the merits. *Matter of Peekamose Fishing Club*, 151 N. Y. 511; motion for reargument denied, 152 N. Y. 629.

The failure of a referee, before whom a hearing is had, to make in his report a statement of the effect, credits, and other property, and of the debts and other engagements of the corporation, and of all other matters pertaining to its affairs, is fatal to the validity of the proceedings and renders an order dissolving the corporation, entered upon such defective report, void. *Matter of E. M. Boynton S. & F. Co.*, 34 Hun, 369.

ARTICLE VI.**FINAL ORDER AND ITS EFFECT. § 190.****§ 190 (Formerly Code, § 2428). Final order.**

Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance,

in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in the code of civil procedure for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

Where the report of the referee on a petition for dissolution enumerates more books of the corporation than are contained in the schedule annexed to the petition, the discrepancy is not a ground for refusing final order, the trustees having made the schedule in good faith. *Matter of Santa Eulalia Silver Mining Co.*, 2 Supp. 221; aff'd, 21 St. Rep. 89, 4 Supp. 174.

The words, "beneficial to the interests of the stockholders," in section 2429, were not intended to make it mandatory upon the court to decree a dissolution in cases where it would be beneficial to a majority of the stockholders, when the best interests of the minority demand a continuance of the corporation's existence. The intention is to confide a discretionary power to the court to order a dissolution if, in its opinion, and viewing all the circumstances of the case, the best interests of the stockholders will be subserved thereby. In the exercise of such discretion, the court is bound to consider the interests of the minority as well as the majority. *Matter of Importers & Grocers' Exchange*, 18 St. Rep. 175; rev'd, 28 St. Rep. 446, 15 Daly, 419; aff'd, 43 St. Rep. 625, 132 N. Y. 212.

This proceeding is purely statutory and the statute must be strictly pursued. Meanwhile as the corporation lives until the final order of the court decreeing dissolution, the property of the corporation is *in custodia legis* through the temporary receivers. The statute prescribes that the allegations and proofs of the parties must be heard and determined by the court or a referee. And it is only after such hearing and determination of the court thereupon, made after notice, that the final order of dissolution can be made. *Matter of Malcolm Brewing Co.*, 78 App. Div. 592, 79 Supp. 1057.

Where a corporation has gone into liquidation, the rights and debts of the parties would be fixed and the assets of the corporation would be best protected by enjoining all suits and expenses, except as might be necessary in adjusting the respective debts in liquidation. The effect of a voluntary dissolution of a corporation is to place all its property and all its assets in the custody of the law to be collected and applied by a person appointed by the court. *Walsh v. Seager Bros.*, 1 St. Rep. 189.

An action for personal injuries arising through the negligence of a corporation, not incorporated, so far as the record shows, under the act for the organization and regulation of business corporations (L. 1875, chap. 661), nor under the Business Corporations Law (L. 1892, chap. 691), does not survive a voluntary dissolution of the corporation and an

appointment of a receiver, and, therefore, the court has no power to permit the action to be continued against such receiver. *Matter of Yuengling Brewing Co.*, 24 App. Div. 223, 49 Supp. 12.

The liability of a corporation for negligence causing personal injuries survives its dissolution.

After dissolution the directors by virtue of section 30 of the General Corporation Law become trustees for the creditors and are personally liable for corporate debts to the extent of the corporate property coming into their hands. But an action by the creditor of a dissolved corporation must be brought against the corporation, not against the directors alone.

Quære, as to whether the trustees can be joined as defendants in an action against the corporation. *Cunningham v. Glauber*, 133 App. Div. 10, 117 Supp. 866.

Upon the dissolution of a corporation actions for personal injuries pending against it on trial abate and cannot be reviewed or continued against the receiver. The rule in such actions is the same as where the defendant is a natural person, and the cause of actions dies with the death of the tortfeasor. As the law now stands the dissolution of a corporation apparently defeats causes of action against it by any person, however meritorious. *Matter of N. Y. Oxygen Co.*, 67 St. Rep. 549, 33 Supp. 726, 24 Civ. Pro. 398, citing *Grafton v. Union Ferry Co.*, 46 St. Rep. 549; *Sturges v. Vanderbilt*, 73 N. Y. 384; *McCulloch v. Norwood*, 58 N. Y. 562.

A receiver appointed in proceedings for a voluntary dissolution takes title to the assets upon the order of appointment, and no superior lien can be acquired by the levy of an attachment between the making of the order and the time the receiver takes possession. *Dickey v. Bates*, 13 Misc. 489, 35 Supp. 525, 70 St. Rep. 136. But the title of the receiver to the assets of a corporation does not relate back so as to divest the lien of the execution levied between his appointment and qualification, where the corporation had no defense to the action, but delayed recovery of judgment by interposition of a frivolous answer. *Matter of Lewis & Fowler Mfg. Co.*, 89 Hun, 208, 34 Supp. 983, 69 St. Rep. 44.

Where an execution issued upon a valid judgment against a corporation to the sheriff of the proper county, upon the same day as, but prior to the filing of an order appointing a temporary receiver of the property of the corporation, the execution, being prior in time, is entitled to priority over the title acquired by the receiver. *Matter of the Gies Lithographic Co.*, 7 App. Div. 550, 74 St. Rep. 704, 40 Supp. 146. The title of a receiver appointed in proceedings for the voluntary dissolution of a corporation relates back to the date of his appointment, and from that date the property is in the custody of the law and is not subject to attachment at the suit of a creditor of the corporation. *Matter of*

Christian Jensen Co., 128 N. Y. 550, 40 St. Rep. 621, 27 Abb. N. C. 303, aff'g 59 Super. Ct. 552, 39 St. Rep. 379, 15 Supp. 144.

The lien of an execution levied upon property of a corporation, after the filing of a petition for its voluntary dissolution, and before the appointment of a receiver, is valid as against the receiver. *Matter of Muehlfeld & Haines Piano Co.*, 12 App. Div. 492, 42 Supp. 802; rep'd, 26 Civ. Pro. 90, *sub nom.*, *Looschen v. Muehlfeld & Haynes Piano Co.*

The receiver of an insolvent corporation derives his power and authority from the provisions of the General Corporation Law, which do not permit him to sell the corporate realty, subject to certain liens referred to in the final decree and disregard others that are valid and existing, but he is required to redeem mortgages and pledges and satisfy judgments which may be an incumbrance upon the property, or to sell it subject thereto. *Matter of Coleman*, 174 N. Y. 373, rev'g 77 App. Div. 496, 78 Supp. 1052.

After a corporation had assumed payment of a mortgage on property it took, and before anything had been collected on the mortgage, it went into the hands of a receiver, and thereafter the mortgage was foreclosed and a judgment for a deficiency taken. *Held*, that the holder of the mortgage was entitled to his proportional dividend on the whole mortgage debt, so long as it did not exceed the amount of the deficiency. *Matter of Simpson*, 36 App. Div. 562, 55 Supp. 697; aff'd without opinion, 158 N. Y. 720.

While the court has power to decree distribution of the funds of the corporation among those entitled thereto, it may not take from the trustee funds placed in his hands for the corporation for a specific purpose pursuant to a contract obligation and itself distribute them through its receiver instead of through the trustee. The authority of the court is limited to compelling the trustee to distribute the fund as provided for by the contract, under its supervision. Where a trust company had paid over the fund to the receiver pursuant to an order made without notice, it was held the payment was not voluntary and the company could move the court to require the receiver to pay back so much of the fund as still remained in his hands. That as to the moneys paid out the receiver was entitled to be protected. As to payments made to the attorneys in the dissolution proceeding for their fees, it was proper to require them to pay back to the receiver the money so received by them, and to direct him upon receipt thereof to pay them over to the trust company. *Matter of the Home Provident Safety Fund Assoc. of N. Y.*, 129 N. Y. 288, cited *Matter of Binghamton Gen. Elec. Co.*, 143 N. Y. 261, on the proposition that every lien upon the property of the corporation resting upon valid claims or process, before the appointment of the receiver, the lienor being in lawful possession, must be preserved with the right of enforcement.

A judgment not entered until long after the appointment of the receiver, and where no real estate came into his possession, is not entitled to a preference. *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 5 Supp. 84, citing *Atty.-Gen. v. At. Mut. Ins. Co.*, 100 N. Y. 279.

One who takes an assignment, after dissolution of a corporation, of a claim upon which its contingent liability became fixed before that event, into their hands, has the same rights as his assignor and is a creditor of the corporation. *Moosbrugger v. Walsh*, 89 Hun, 564, 35 Supp. 550, 70 St. Rep. 117. Where the property of the debtor is taken possession of by the court to be administered for the benefit of all the creditors, the statute does not run against any debts not then barred. *Ludington v. Thompson*, 4 App. Div. 117, 38 Supp. 768, 74 St. Rep. 110; *aff'd*, 153 N. Y. 499.

Upon the voluntary dissolution of a corporation the directors become trustees for the creditors and it is their duty to settle the affairs of the corporation, collect assets, pay debts, and divide the money and other property remaining among the persons entitled thereto.

Even though the directors of a corporation after dissolution have illegally distributed its assets without providing for a judgment on which the corporation was liable, a receiver *pendente lite* will not be appointed in a subsequent action by the judgment creditor against the corporation and its directors. This, because owing to the distribution the corporation owns no property and the directors who participated in the distribution are jointly and severally personally liable for the damage sustained by the judgment creditor. *Tapley Co. v. Keller*, 133 App. Div. 54, 117 Supp. 817.

A corporation which has been voluntarily dissolved is not thereby relieved from the obligation of its contracts unless it be shown that the dissolution was necessary because of its financial condition.

When a corporation having an existing contract with the plaintiff to perform work on the plaintiff's building goes into voluntary dissolution, and the receiver, after obtaining leave of court to complete existing contracts, carries out those advantageous to the corporation, but repudiates the contract with the plaintiff as unprofitable, and is thereafter discharged with a direction to turn over all the assets to the corporation, there is a presumption that the dissolution was not necessary, but was used as an expedient to relieve the corporation from undesirable obligations, and a dismissal of the complaint is error. *Stannard v. Reid & Co.*, 114 App. Div. 135, 99 Supp. 567.

The life of a corporation continues until the making of a final order dissolving it. So held where the directors of a corporation took proceedings for its voluntary dissolution. It was held that there was no personal liability on the part of the defendants. The proceedings were those of the corporation by its constituted agents. *Drew v. Keufer*, 81

Hun, 144, 62 St. Rep. 697, 30 Supp. 733. Same case reported under the title of *Drew v. Longwell*, 81 Hun, 144, citing *Skinner v. Smith*, 56 Hun, 437, 31 St. Rep. 448; *Marbled Iron Works v. Smith*, 4 Duer, 662.

A suit by a stockholder to set aside a transfer of stock alleged to have been induced by fraud is not barred on the theory that the issue is *res adjudicata* merely because after the transfer, which disqualified the plaintiff as a director, his transferee with the other directors instituted a proceeding for voluntary dissolution which was granted upon a finding that the plaintiff had transferred his shares for a valuable consideration so that he was disqualified as a director, even though in that proceeding the plaintiff appeared and denied that the assignee was a director or authorized to act as such, if in fact the issues tendered in the complaint to set aside the assignment were not actually litigated.

Such issues were not necessarily involved in the dissolution proceedings, where the transfers were regular upon their face and the transferee had been elected a director when he signed the petition for dissolution so as to be a *de facto* director, for in that case the court had jurisdiction to entertain the proceeding.

The order dissolving the corporation was an adjudication only in so far as it established that the transferee was a *de facto* director. *MacMahon v. Stepney Spare Wheel Agency*, 140 App. Div. 554.

A final decree dissolving a corporation and appointing a permanent receiver, which orders a sale of the realty subject to specified liens, does not have the effect of divesting the liens of existing judgments not referred to therein, and, until any particular judgment is satisfied from the moneys in the hands of the receiver, it is the right of the owner of the judgment to proceed to execution and sell subject to the order of the court. *Matter of Coleman*, 174 N. Y. 373, rev'g 77 App. Div. 496, 78 Supp. 1052.

When a corporation has been legally organized, its existence may continue after an event which would be sufficient cause for its dissolution by the court, and when dissolved for violation of laws under which it existed, the rights of the creditors, who have become such since the time when it has forfeited its rights, cannot be ignored, and such of its assets as have been seized by the court must, in the absence of statutory provisions, be distributed among creditors according to the principles of equity. *Matter of the Application of the Com'rs of the State Reservation*, 122 N. Y. 177.

A judgment recovered in another State, against a corporation organized under the laws of this State after such corporation has been dissolved in an action to which the receiver was not a party, is not enforceable in our courts against the receiver, although it is valid under the laws of the State in which it was recovered. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y.

34, aff'g 87 Hun, 384, 34 Supp. 323, 68 St. Rep. 474. Where the by-laws of a foreign benevolent society provided that each branch should retain a certain percentage of assessments to form a reserve fund to be the property and subject to the control of the supreme body, the reserve fund of each local branch, upon the society becoming insolvent where there are no creditors in this State except members, should be repaid to the members thereof in proportion to their payments contributed to the fund. *Lindquist v. Glines*, 3 Misc. 214, 23 Supp. 272. Where there are sufficient assets in the hands of receivers of a corporation, the claim of a creditor must be paid although the time to prove debts against the estate has expired. *People v. Remington & Sons*, 59 Hun, 282, 36 St. Rep. 282, 12 Supp. 824; aff'd on opinion below, 126 N. Y. 654. Where a creditor proves certain claims against an insolvent corporation, it cannot also prove coupon notes which it had agreed should be held as security for any indebtedness of the corporation against the other parties to such notes. The creditor of an insolvent corporation has the right to prove and have dividends of his entire debt irrespective of the collateral security held by him. *People v. Remington & Sons*, 54 Hun, 480, 28 St. Rep. 427, 8 Supp. 31; aff'd, 121 N. Y. 328, 25 Abb. N. C. 78, 31 St. Rep. 289.

If premises leased to a corporation are vacated before the expiration of the term, on the appointment of a receiver in proceedings for a dissolution of a corporation, and the lessor, in accordance with the terms of the lease, re-enters and relets to a third party for the unexpired term at a less rental, the difference between the rent for the balance of the term reserved under the original lease, and that reserved under the subletting constitutes a definitely established claim against the corporation, which the receiver is empowered to recognize. The situation of a receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors, whose powers and duties are prescribed by that instrument. *People v. St. Nicholas Bank*, 151 N. Y. 592, aff'g 3 App. Div. 544, dist'g *Matter of Hevenor*, 144 N. Y. 271, 63 St. Rep. 692. Taxes assessed upon the personal property of an insolvent corporation, and which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors, are not a prior lien upon the assets in the hands of a receiver for distribution under the direction of the court, and which arose from the sale of the property subject to the levy. *Wise v. Wise Co.*, 153 N. Y. 507, aff'g 12 App. Div. 319, 42 Supp. 54, 76 St. Rep. 54.

Unless a judgment creditor of a corporation, for which a receiver has been appointed, has acquired a statutory lien upon its assets prior to the appointment of the receiver, he is not entitled to a preference over other creditors, and his rights as creditor must be worked out through the receivership. *Mosher v. Supreme Sitting of Iron Hall*, 88 Hun, 395, 68

St. Rep. 755, 34 Supp. 816. A party loaning money to an embarrassed corporation, subsequently adjudged to be insolvent and taking security therefor, is not in a position which entitles him in equity to be adjudged to have a lien upon mortgaged property of the corporation or its proceeds in preference to bondholders of mortgages existing when the loan was made; and it is immaterial for what purpose the loan was made or how the money received thereon was applied, if the bondholders thereon were not parties to the transaction. *Farmers' Loan & Trust Co. v. Bankers & Merchants' Telegraph Co.*, 148 N. Y. 315, aff'g 83 Hun, 560, 65 St. Rep. 35, 31 Supp. 1096.

ARTICLE VII.

PERMANENT RECEIVER. §§ 191-194.*

§ 191. *Permanent receiver*, 846.

§ 192. *Appointment of director, trustee or other officer or stockholder as receiver*, 847.

§ 193. *Certain sales, transfers and judgments void*, 847.

§ 194. *Omission, defect or default of receiver*, 847.

§ 191 (Formerly Code, § 2429). Permanent receiver.

Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in section one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. Upon the entry of the order the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter.

Consolidators' note to section 191. In the title in the Code of Civil Procedure relating to proceedings for the voluntary dissolution of a corporation there will be found no statement of the powers, duties, and liabilities of receivers who may be appointed in such proceedings. There is not even a reference to the proceedings conferring upon the receivers appointed in the proceedings the powers, duties and liabilities of receivers. The omission, however, is supplied by the Laws of 1880 (chap. 245, § 1, subd. 3, p. 369), which provides as follows: "Sections 66 to 89 (Revised Statutes, part 3, chap. 8, tit. 4, art. 3), both inclusive, which are hereby made applicable to a receiver appointed as prescribed in section 2429 of the Code of Civil Procedure." These sections of the Revised Statutes comprise in themselves or by reference the provisions in the Revised Statutes relating to the powers, duties, and liabilities of receivers. The provisions of the Revised Statutes referred to have been consolidated in article 2 of this chapter and have been incorporated in this article relating to proceedings for the voluntary dissolution of a corporation by a reference at the end of section 191 as follows: "A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter."

* The powers and duties of receivers both temporary and permanent are fully considered under title "Corporations, Receivers of" in so far as they relate to receivers in voluntary dissolution.

§ 192 (Formerly Code, § 2429). Appointment of director, trustee, or other officer or stockholder as receiver.

The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of a corporation, a receiver of its property.

Consolidators' note to section 192. This section is the same as the following provision in the Revised Statutes which latter provision therefore has been repealed:

Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers. (Revised Statutes, part 3, chap. 8, tit. 4, art. 3, § 66.)

§ 193. (Formerly Code, § 2430). Certain sales, transfers and judgments void.

A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this article, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding and as against the creditors of the corporation.

Consolidators' note to section 193. This section is the same as the following section of the Revised Statutes which latter section therefore has been repealed:

All sales, assignments, transfers, mortgages and conveyances of any part of the estate real or personal, including things in action, of every such corporation, made after the filing of the petition, for a dissolution thereof, in payment of, or as a security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporations after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation. (Revised Statutes, part 3, chap. 8, tit. 4, art. 3, § 71.)

§ 194 (Formerly Code, § 2429). Omission, defect or default of receiver.

In a proceeding for the voluntary dissolution of a corporation, the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the state, relieve a receiver from any omission, defect or default, in any proceeding or act required by law to be taken, or done, or in the giving of any notice required by law to be given, and the court may upon like notice, confirm any act of a receiver, and any decision, report, order or judgment made in such proceeding.

The rights, powers, duties, and obligations of permanent receivers are fully considered, precedents given, and authorities cited under "Receivers of Corporations" in "Special Actions." See last clause of section 191 which refers to article eleven of General Corporation Law which contains provisions as to "Permanent Receivers."

ARTICLE VIII.

MISCELLANEOUS PROVISIONS AND MATTERS OF PRACTICE. §§ 177, 189, 312, 314-316.

§ 177. *Corporations without stockholders, 847.*

§ 189. *Amending papers, 848.*

§ 312. *Service of papers upon Attorney-General, 848.*

§ 314. *Application to the court in certain action and proceedings, 849.*

§ 315. *County wherein action may be brought by Attorney-General on behalf of the people, 849.*

§ 316. *Preferences in actions or proceedings by or against receivers, 849.*

§ 177 (Formerly Code, § 2431). Corporations without stockholders.

In the case of corporations affected by the provisions of this article and not having stockholders, it shall be sufficient for the purposes of this article to notify, name and

refer to the "members" of such corporations, instead of "stockholders", as herein provided.

§ 189 (Formerly Code, § 2427). Amending papers.

The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

§ 312. Service of papers upon attorney-general.

A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

Consolidators' note to section 312. The provisions of this section apply not only to actions brought by the Attorney-General but to proceedings for the voluntary dissolution of a corporation. Hence its insertion in this general article.

"That section 8 of chapter 378 of the Laws of 1883, entitled 'An act in relation to receivers of corporations,' requiring that a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, in every action for the dissolution of a corporation, shall, in all cases, be served on the Attorney-General, applies to proceedings for the voluntary dissolution of corporations, and the court has no jurisdiction to entertain such proceedings unless a service of such notice is made or waived." *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 175.

"*Held*, that the action brought to sequester the property of the company, in which Henry was appointed receiver, was an action for 'a distribution of its assets,' within the meaning of section 8 of chapter 378 of 1883, requiring copies of all notices and all motion papers in every such action to be served upon the Attorney-General." *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 165.

Other citations under this section are *Dohn v. Buffalo Amusement Co.*, 66 App. Div. 446; *Nealis v. American Tube & Iron Co.*, 76 Hun, 220; *Matter of Stonebridge*, 57 Hun, 441; *People v. American Steam Boiler Ins. Co.*, 3 App. Div. 504.

An order to show cause is equivalent to a notice of motion and a motion may be brought on by such an order though not returnable in less than eight days.

No notice to the Attorney-General is required of an application for an order to show cause why a petition for the voluntary dissolution of a corporation should not be granted.

A verified petition is an affidavit within the meaning of the Code of Civil Procedure and an order to show cause may be granted thereon. *Matter of Geneva Basket Co.*, 71 Misc. 156.

§ 314. Application to the court in certain actions and proceedings.

All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

§ 315. County wherein action may be brought by attorney-general on behalf on the people.

An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

Consolidators' note to section 315. This provision of the statute of 1883 has been incorporated in this article because it relates to actions or proceedings brought by the attorney-general "against any corporation for the purpose of procuring its dissolution, the appointment of a receiver or the sequestration of its property."

§ 316. Preferences in actions or proceedings by or against receivers.

All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings by the people of the state of New York.

Parties to a proceeding for dissolution after becoming such are entitled to notice of any application made therein. *Matter of Wendler Machine Co.*, 2 App. Div. 16, 72 St. Rep. 499, 37 Supp. 444.

Proceedings to dissolve a corporation, instituted by its board of directors, are not part of an action by the people to dissolve it because of a forfeiture of its charter, even though the proceedings instituted by the directors were regular up to the time of the presentation of the petition to the court, which was prior in point of time to the commencement of the action. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 5 Supp. 136.

A stockholder of a bank who has, on the basis of a dissolution of the bank, with full knowledge of the facts obtained an order allowing him to intervene in a proceeding to reach newly-discovered assets, cannot thereafter attack the dissolution proceedings as void. *Matter of Grand Cent. Bank*, 42 App. Div. 157, 58 Supp. 1022, aff'g 27 Misc. 116, 57 Supp. 418.

Where a final order has been made in proceedings for the voluntary dissolution of a corporation, directing a distribution of the assets among creditors, it is not proper, upon a motion to substitute the name of a foreign assignee for the creditor to whom payment is directed to be made, to determine the conflicting rights of such assignee and attaching creditors in this State, but the assignee should be required to present those questions, either upon a rehearing after an application to open the final decree, or upon an application to vacate the attachments. *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9, rev'g 38 App. Div. 323, 57 Supp. 38.

The act of 1870, providing that a receiver of a corporation other than a manufacturing corporation could only be appointed in a civil action,

manifestly referred to a corporation in existence, and not to one which is dissolved, and in such case a receiver may be appointed on the application of either the trustees or a creditor. *Matter of Pontius*, 26 Hun, 232.

In a proceeding to dissolve a corporation, a defendant obtained an order based on an affidavit, the original petition, the referee's report, with the exceptions thereto, and the testimony taken by him, and all the papers in the proceeding, to show cause why a final hearing should not be had, and a final order made dismissing the proceedings. The affidavit set out all the proceedings, and averred that petitioner had omitted to serve notice for a final order, and his delay was causing injury, and that affiant believed that the referee's report, though delivered to petitioner, was in effect a decision in favor of defendant. *Held*, that on the hearing the court had jurisdiction to make an order of dissolution, though such defendant did not appear, and none of the other defendants were present. *Matter of Peekamose Fishing Club*, 151 N. Y. 511.

In a proceeding for the voluntary dissolution of a corporation, an order appointing receivers was granted by a justice of the Supreme Court at his residence, and signed with the direction "enter," *held*, that it was an order of the court and did not become operative until entered by the clerk, the title of the receivers did not relate back further than the time of entry, and did not entitle them to money in a bank which on the same day, but before the order was entered, applied the money to payment of a note of the corporation held by the bank, and falling due on that day. *Wilcox v. National Shoe & Leather Bank*, 67 App. Div. 466, 73 Supp. 900.

In a proceeding to dissolve a corporation, the omission to give the Attorney-General formal notice of a motion to dismiss (L. 1883, chap. 378, § 8), on the hearing of which an order of dissolution was made, was immaterial, where he was served with the motion papers on the order to show cause, and with the order applied for, and, two days before the hearing, admitted due service of the proposed order of dissolution, and of notice of settlement. *Matter of Peekamose Fishing Club*, 151 N. Y. 511.

The omission of a receiver of an insolvent corporation appointed in proceedings for voluntary dissolution to serve upon the Attorney-General notice of an application for an order to sell its property is cured by a subsequent order of the court made upon due notice to the Attorney-General confirming such sale and directing the re-entry of an order therein *nunc pro tunc*. The case comes under section 2429 of the Code of Civil Procedure. Upon the confirmation by the court the title of the purchaser at the sale becomes effective. It is immaterial if stockholders of the corporation received no notice of the application for the order of confirmation. *Johnson v. Rayner*, 25 App. Div. 598.

In a proceeding for the voluntary dissolution of a brewing corporation the court should not, except for the most cogent reasons, authorize a sale of all the property of the corporation prior to the entry of the final order dissolving the corporation. *Matter of Malcom Brewing Co.*, 78 App. Div. 592, 79 Supp. 1057.

The provisions of the Code of Civil Procedure, permitting the sale of lands in partition, free of all liens, are not applicable to the dissolution of corporations on the ground of insolvency. *Matter of Coleman*, 174 N. Y. 373, rev'g 77 App. Div. 496, 78 Supp. 1052.

In *Re American Dramatic Fund Assoc.*, 22 Abb. N. C. 231, 3 Supp. 793, the question was discussed under what circumstances a corporation will be dissolved. It is held that the fact that all of the details required by statute to be complied with in the distribution by the receiver cannot be carried out does not render the statute inapplicable where those requirements are not pertinent in view of the circumstances and character of the corporation. The Attorney-General must be given notice of the application made under section 2419, pursuant to provisions of chapter 282 of Laws of 1896, amending chapter 378 of the Laws of 1883, whether the corporation is solvent or insolvent. The court may vacate an order to show cause why a corporation should not be dissolved if granted without such notice. The fact that the court has no power to make such an order does not prevent it subsequently vacating it. *Matter of Broadway Ins. Co.*, 23 App. Div. 282, 48 Supp. 299, 82 St. Rep. 299. A court of equity has no power to appoint a receiver to take charge of and continue the business of the solvent corporation in a proceeding which does not ask for the dissolution, but is intended to hinder and delay creditors who bring suit. *Matter of Atlas Iron Construction Co.*, 72 St. Rep. 801, 38 Supp. 173.

An order appointing a receiver on the voluntary dissolution of a corporation will not be amended to permit entry of judgment in prior attachment actions in which the receiver had not been substituted, or to which he was not a party. *Matter of Vertical Tube & Boiler Co.*, 59 Super. Ct. 433, 38 St. Rep. 528, 14 Supp. 478.

The method prescribed by the statute for ascertaining the claims of creditors in proceedings for the voluntary dissolution of a corporation are not exclusive and the court may, when in its judgment it is proper to do so, authorize an action to be brought against the receiver who disputes the validity of a claim so that the latter may be more deliberately examined and determined. *Ludington v. Thompson*, 153 N. Y. 499, aff'g 4 App. Div. 117, 38 Supp. 768.

The Supreme Court in its inherent power to set aside and vacate its orders and judgments may set aside an order for the voluntary dissolution of a corporation where substantial justice will be subserved.

The court is not precluded from vacating such order on the theory that the corporation became forever legally dead on the entry of the order.

It is not necessary that the order in voluntary dissolution proceedings be tainted with fraud or irregularity in order to authorize the court to set it aside; it is sufficient that it was improvidently granted.

An order to show cause why an order for the voluntary dissolution of a corporation should not be vacated need not be served on all the stockholders and creditors of the corporation, where the Attorney-General and the receiver of the corporation and the only stockholder who appeared in the original dissolution proceedings are before the court and the directors, other than the moving party, have ceased to have any interest as stockholders and the creditors are duly protected by a bond given by the moving party.

Stockholders who did not appear in the dissolution proceedings are not necessarily parties to a motion to vacate an order of dissolution. *Matter of Automatic Chain Co.*, 134 App. Div. 863, 119 Supp. 379; *aff'd* without opinion, 198 N. Y. 618.

Where a stock corporation is prosperous and no reason appears why it should be voluntarily dissolved, the court will, at the suit of minority stockholders, who allege that the dissolution of the corporation and the proposed substitution for the latter of a partnership constitute a scheme of the majority to "freeze out" the minority and buy in the corporate assets at a loss to the corporation, restrain all proceedings looking to a dissolution until the question whether a permanent injunction should be granted the minority has been decided by a trial upon the merits; and this, although the minority acting, as they now allege, in haste or under the influence of the dominating stockholders of the corporation, have already, as directors, voted at a preliminary meeting of the directors, in favor of dissolution and have then signed a written agreement to form a partnership in lieu of the corporation. *Elbogen v. Gerberaux-Flynn Co.*, 30 Misc. 264, 62 Supp. 287; *rev'd*, 50 App. Div. 623, 64 Supp. 1.

In proceedings for a voluntary dissolution upon the question whether it "is beneficial to the interests of the stockholders that a corporation should be dissolved" (Gen. Corp. Law, L. 1909, chap. 28 [Cons. Laws, chap. 23], § 170), the interests of the minority stockholders, as well as those of the majority, are entitled to be considered.

The fact that stockholders had brought an action in equity to secure to the corporation the benefits of a contract which the petitioners had assumed to have been allowed to be forfeited, against its real interests, in which action demurrers to the complaint were overruled, is a material circumstance bearing on the question whether a dissolution should be decreed. To dissolve the corporation, before that litigation has been determined on the merits, deprives the minority stockholders in advance of any redress therein.

It was error for the referee to refuse to receive evidence of the proceedings in such action, and of the facts alleged in the answer to the petition in this proceeding and upon which the contesting stockholders relied, as constituting reasons why the corporation should not be dissolved. *Matter of Rateau Sales Co.*, 201 N. Y. 420, rev'g 141 App. Div. 931.

Upon the sale of the property of a corporation, after the stockholders have voted for its dissolution, but before such dissolution is effected, the sole right to the use of its corporate name is a property right and passes to a purchaser thereof who may prevent any competitor from using it. *Goddard v. American P. & C. Co.*, 67 Misc. 279, 122 Supp. 360.

The court has no power to grant an extra allowance to the petitioners in a proceeding for the voluntary dissolution of a corporation. *Matter of Tarrytown, W. P. & M. R. Co.*, 133 App. Div. 297, 117 Supp. 695.

ARTICLE IX.

APPEALS.

A proceeding for the voluntary dissolution of a corporation under the statute is a special proceeding; and a final order made therein is reviewable as of right by the Court of Appeals. *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9, rev'g 38 App. Div. 323, 57 Supp. 38.

The propriety of refusing to set aside an order dissolving a corporation, entered on default, cannot be questioned in the Court of Appeals. *Matter of Peekamose Fishing Club*, 151 N. Y. 511.

ARTICLE X.

PRECEDENTS IN PROCEEDING FOR VOLUNTARY DISSOLUTION OF A CORPORATION.

(For additional precedents, see "*Special Actions*," p. 260.)

Notice of Application for Order to Show Cause.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE APPLICATION OF THE
J. B. HACKETT CO. FOR VOLUNTARY
DISSOLUTION.

SIR.—Please take notice that on the petition of the directors of the J. B. Hackett Company, verified January 11, 1910, and the schedule thereto annexed, copies of which are herewith served upon you, we shall apply at a Special Term, Part II thereof, of the Supreme Court to be held in and for the county of New York, at the County Court House in the borough of Manhattan, city of New York, on the 17th day of January, 1910, at 10:30 A. M., for an order requiring all persons interested in said corporation to show cause why the said corporation should not be dissolved and an injunction granted against the institution or prosecution of any action against said corporation, a copy of which proposed order is served upon you herewith.

Dated, January 12, 1910.

Yours, etc.,

WINGATE & CULLEN,
Attorneys for Petitioners.

To Edward R. O'Malley, Esq., Attorney-General.

Proposed Order.

(Title.)

(Special term caption.)

On reading and filing the petition of John B. Hackett, Alrick H. Man and Edward A. Grenzbach, directors of the J. B. Hackett Company, a corporation organized under the Business Corporations Laws of the State of New York and having its principal office at 5 and 7 Beekman street, in the borough of Manhattan, city of New York, duly verified by the petitioners on the 11th day of January, 1910, and the schedule thereto annexed; from which petition it appears that the case is one of those specified in section 170 of the General Corporation Law; and it further appearing to the satisfaction of the court from said petition that the said corporation is insolvent; and on reading and filing notice of this application dated January 12, 1910, with proof of due service thereof and of the said petition and schedule, and of a copy of this order upon the Attorney-General; and after hearing of counsel for the petitioners, and representing the Attorney-General; now, on motion of Wingate & Cullen, attorneys for the petitioners, it is

Ordered, that all persons interested in said corporation show cause before this court, before _____, Esq., who is hereby appointed referee for that purpose, at his office, No. _____ in the borough of Manhattan, city of New York, on the _____ day of January, 1910, at _____ o'clock in the _____ noon, why the said corporation should not be dissolved; and it is further

Ordered, that a copy of this order be published at least once a week for three weeks next succeeding, in the _____ of _____, which paper is published in the city and county of New York; and it is further

Ordered, that until the hearing and determination of this application all creditors of said corporation be and they are hereby enjoined from instituting any action or legal proceeding against said corporation, or interfering with its property and assets.

(Title.)

Petition and Schedules.*To the Supreme Court of the State of New York:*

The petition of John B. Hackett, Alrick H. Man and Edward A. Grenzbach, constituting all the directors of the J. B. Hackett Company, respectfully shows:

1. That J. B. Hackett Company is a corporation organized under the Business Corporations Law of the State of New York, and that its principal place of business is located in the city and county of New York.

2. That your petitioners constitute all the directors of the said corporation. Their names and residences are as follows: John B. Hackett, Richmond Hill, New York city; Alrick H. Man, Richmond Hill, New York city; Edward A. Grenzbach, No. 214 West 122d street, Manhattan, New York city.

3. That the purposes for which said corporation was organized was the manufacture and sale of grates and grate bars and high-grade steam specialties. The amount of its authorized capital stock is fifteen thousand dollars (\$15,000). The amount issued and outstanding is eight thousand five hundred dollars (\$8,500), of which one thousand dollars (\$1,000) is in the company treasury.

4. That your petitioners have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it. That the business for the last two years has shown a steady loss, the loss for the year ending December 31, 1909, being about two thousand two hundred dollars (\$2,200). That the assets of the said corporation do not exceed in value six hundred and sixty-three dollars and thirty-nine cents (\$663.39),

and that the amount due creditors is over three thousand four hundred dollars (\$3,400), making a deficiency of over two thousand five hundred dollars (\$2,500).

That the creditors are pressing for payment. That the corporation is without funds to pay them, and that unless a receiver is appointed to take possession of and preserve the assets of the corporation and divide them equally among the creditors, they will be seized and sold in some legal proceeding instituted for the benefit of one or more creditors and probably sacrificed. That for these reasons your petitioners deem it beneficial to the interests of the stockholders that the said corporation should be dissolved.

5. That by resolution of the board of directors of said corporation passed January 10, 1910, these facts were recited and the officers and directors of the corporation were directed to institute proceedings for the voluntary dissolution of the corporation and for the appointment of a receiver of its assets, to insure their distribution among the different creditors and to prevent such assets being seized by legal proceedings in actions which may be brought by any of such creditors.

6. That your petitioners have annexed to this petition a schedule marked "Schedule A," which in its different subdivisions contains the statement required by the provisions of the General Corporation Law, as far as your petitioners know or have the means of knowing the same.

WHEREFORE, your petitioners pray for a final order of this court dissolving the said corporation and appointing a receiver of its property and effects, and for an injunction restraining the institution and prosecution of any action at law against it, and for the appointment of a temporary receiver of its property until the hearing and determination of such proceedings and the appointment of a permanent receiver.

Dated,

(Add verification.)

(Here insert schedules.)

Petitioners.

Affidavit to Accompany Petition.

(Title.)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN B. HACKETT, being duly sworn, deposes and says: I am the president and one of the directors of the J. B. Hackett Company, and am familiar with the facts set forth in the foregoing petition. This corporation has been engaged in business at No. 5 and 7 Beekman street, in the borough of Manhattan, city of New York, since its organization. Such business consists of dealing in grates and grate bars and high-grade steam specialties. The directors are myself, Alrick H. Man and Edward A. Grenzbach.

The corporation was organized with a capital of fifteen thousand dollars (\$15,000), eight thousand five hundred dollars (\$8,500) of which has been issued and one thousand dollars (\$1,000) of which was turned back to the company and is now treasury stock, leaving the stock actually outstanding seven thousand five hundred dollars (\$7,500).

The corporation has been unsuccessful, and although every effort has been made by the officers and directors of the company to make it prosperous, it has been unavailable. For the last two years its business has shown an annual loss, which loss amounted during the year 1909 to about two thousand two hundred dollars (\$2,200). At the present time its total assets do not exceed the book value—six hundred and sixty-three dollars and thirty-nine cents (\$663.39)—while the amount due creditors is three thousand four hundred and twenty dollars and seven cents (\$3,420.07). Many of these

amounts due to creditors are small amounts and these creditors are pressing for payment. The corporation is without funds to meet them, and it is certain that within a short time some of these creditors will commence legal proceedings to enforce the collection of their claims, in which the property of the company will be seized and sold at a great sacrifice. The only way in which the assets of the company can be disposed of to advantage and be fairly divided among the creditors is by the appointment of a receiver and by an injunction restraining the bringing of any suits against the corporation by the different creditors.
(Jurat.)

Order to Show Cause Before Referee with Injunction.

(Title.)

(Special Term Caption.)

On reading and filing the petition of John B. Hackett, Alrick H. Man and Edward A. Grenzbach, director under the Business Corporations Law of the State of New York and having its principal office at 5—7 Beekman, street, in the borough of Manhattan, city of New York, duly verified by the petitioners on the 11th day of January, 1910, and the schedule thereto annexed; from which petition it appears that the case is one of those specified in section 170 of the General Corporation Law; and it further appearing to the satisfaction of the court from said petition that the said corporation is insolvent; and on reading and filing notice of this application dated January 12, 1910, with proof of due service thereof and of the said petition and schedule, and of a copy of this order upon the Attorney-General; and after hearing George W. Wingate, Esq., of counsel for the petitioners, and the Attorney-General not opposing; now, on motion of Wingate & Cullen, attorneys for the petitioners, it is

Ordered, that all persons interested in said corporation show cause before this court, before Daniel F. Cohalan, Esq., who is hereby appointed referee for that purpose, at his office No. 2 Rector street, in the borough of Manhattan, city of New York, on the 15th day of March, 1910, at 2 o'clock in the afternoon, why the said corporation should not be dissolved; and it is further

Ordered, that a copy of this order be published at least once a week for three weeks immediately preceding the time fixed herein for showing cause, in the *New York Law Journal* of New York, which paper is published in the city and county of New York; and it is further

Ordered, that until the hearing and determination of this application all creditors of said corporation be and they are hereby enjoined from instituting any action or legal proceeding against said corporation, or interfering with its property and assets.

.....
Justice of the Supreme Court.

Notice of Motion to Confirm Report of Referee and for Order of Dissolution.

(Title.)

PLEASE TAKE NOTICE, that upon the petition herein verified the 11th day of January, 1910, the order to show cause granted thereon the 20th day of January, 1910, and the report of Daniel F. Cohalan, Esq., referee herein, dated the 13th day of April, 1910, and filed in the office of the clerk of this court on the 14th day of April, 1910, copies of which are herewith served upon you, and upon all the papers and proceedings hitherto had herein, the undersigned will make a motion before this court at a Special Term, Part I thereof, to be held at the County Court House, in the borough of Manhattan, city of New York, on the 25th day of April, 1910, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a final order herein confirming the aforesaid report of the referee herein, dissolving

the above-named corporation and appointing a receiver therefor and for such other and further relief as to the court shall seem proper and just in the premises.

Dated,, 1910.

Respectfully,

To the

(Title.) **Notice of Filing Referee's Report.**

PLEASE TAKE NOTICE, that the report of Daniel F. Cohalan, Esq., appointed referee by order of this court, dated the 20th day of January, 1910, a copy of which is hereto annexed, was filed in the office of the clerk of this court, in the County Court House, borough of Manhattan, city of New York, on the 14th day of April, 1910.

To the Attorney-General of the State of New York.

(Service of a copy of the above notice of filing and of annexed report of referee is this day admitted.)

Dated,, 1910.

(Title.) **Referee's Report.**

To the Supreme Court of the State of New York:

Pursuant to an order of this court made and entered herein on the 20th day of January, 1910, requiring all persons to show cause before me, as referee, why the above-named corporation should not be dissolved, I do hereby respectfully report to this court as follows:

I first took and subscribed the oath prescribed by law, which said oath is hereto annexed.

Upon the reference before me I have been attended by Laurence H. Doorly, Esq., of counsel for Wingate & Cullen, Esqs., attorneys for the petitioners, and no person or persons appearing in opposition, I thereupon proceeded with the hearing and determination of the matters referred to me by said order, and have heard and examined the witness and considered the testimony and evidence produced by and on behalf of the petitioners, which testimony duly subscribed by the witness is hereto annexed, and upon said testimony and evidence I do hereby determine and report the facts as follows:

First. That notice of this hearing was duly served upon the creditors of the J. B. Hackett Co., and advertisement of aforesaid order to show cause duly complied with.

Second. The J. B. Hackett Co. is a domestic stock corporation, organized and existing under the Business Corporations Law of the State of New York, its certificate of incorporation having been filed in the office of the Secretary of State on the 31st day of August, 1907.

Third. The general purposes for which said corporation was organized are to engage in the sale of steel specialties, steam valves, grate bars and steam traps.

Fourth. The authorized capital stock of said corporation is fifteen thousand dollars (\$15,000), of which eight thousand five hundred dollars (\$8,500) was issued and one thousand dollars (\$1,000) of the same returned to the company as treasury stock.

Fifth. The number of directors of said company is three and the names of the said directors are as follows: J. B. Hackett, Alrick H. Man and Edward A. Grenzbach.

Sixth. The petition herein was signed and verified by a majority of said directors, to wit all of the same.

Seventh. That the petitioners are the owners of all the outstanding capital stock of the company.

Eighth. I find that the allegations set forth in the said petition for dis-

solution are true, and that the stock effects and other property of said corporation are not sufficient to pay all just demands for which it is liable, and I deem it beneficial to the interest of the stockholders that the corporation shall be dissolved and that such dissolution will not be injurious to the public interests.

Ninth. The following is a statement of the effects, credits and other property, and of the debts and other engagements of said corporation:

The company owns no real estate and transacted business at an office.

STATEMENT OF LIABILITIES.

Bills Payable — Note discounted Nov. 3, 1909, 3 mos.

Title Guarantee & Trust Co., Brooklyn branch (since making of the petition taken up by and held by an indorser, H. F. Hackett)	\$300 00
H F. Hackett, loan April 24, 1909	500 00
J. B. Hackett —	
Money loaned	\$675 00
Salary as president	618 50
New England Roller Grate Co.—	1,293 50
Goods purchased	47 20
John T. Lindstrom —	
Goods purchased	189 87
Watts Regulator Co.—	
Goods purchased	267 79
The Kelly Fdry. & Mach. Co.—	
Goods purchased	112 72
Cooke-Wilson Electric Supply Co.—	
Goods purchased (subject to allowance)	329 14
Engineers' List Publishing Co.—	
Advertising	286 47
Smith Bros. Publishing Co.—	
Advertising	16 00
Dougherty Fdry. Co.—	
Goods purchased	52 38
Westinghouse Electric & Mfg. Co.—	
Claim arising from return of goods purchased — claim being adjusted	7 22
Ruhland & Whiting Co.—	
Lease of office to May 1, three (3) months at \$30	90 00
Florence John, stenographer and clerk —	
Wages for remainder of January, three (3) weeks at \$8	24 00
Total	<u>\$3,516 29</u>

STATEMENTS OF ASSETS.

Cash on hand, or in bank	\$153 22
Accounts due:	
Meyer Ice Machine & Engineering Co., No. 1 Montgomery street, Jersey City, N. J.	\$52 50
Port Richmond Hygienic Ice & Cold Stge. Co., Port Richmond, S. I., N. Y.	50 00
W. G. Wild, Hunting, L. I.	68 75
New Western Hotel, 47th street and Madison avenue, N. Y.	3 00
D. L. Holbrook, Point Pleasant, N. J., or No. 17 Battery place, N. Y.	51 00
	<u>225 25</u>

Stock on hand	\$52 05	
Sundry office fixtures	223 09	
		<hr/>
		\$275 14
Total		<hr/>
		\$653 61

I, therefore, respectfully recommend that the prayer of the petitioners be granted, and that a final order herein be granted dissolving the said corporation.

Dated,, 1910.

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Referee.

Order Confirming Referee's Report, Appointing Receiver and for Injunction. (Same title.)

On reading the petition filed herein on the 11th day of January, 1910, by John B. Hackett, Alrick H. Man and Edward A. Grenzbach, being all of the directors of the above-named company, praying for a dissolution of the order made thereon on the 20th day of January, 1910, requiring all persons interested in said corporation to show cause on the 15th day of March, 1910, before Daniel F. Cohalan, Esq., referee, why the said company should not be dissolved and a receiver of the property of said corporation appointed, and on reading and filing the affidavit of John J. Cosgrove, verified the 12th day of March, 1910, and the affidavit of Laurence H. Doorly, verified the 25th day of April, 1910, proving the due service and publication of said order to show cause according to its terms and as required by law, and it appearing from the certificate of the clerk of this court, dated April 23, 1910, that no one has made himself a party to this proceeding by filing a notice of appearance with the said clerk before the close of the hearing before the said referee, and on reading the report of Daniel F. Cohalan, Esq., the referee appointed herein as aforesaid, dated the 13th day of April, 1910, and filed herein on the 14th day of April, 1910, and proof of the due service of a copy thereof and of notice of filing on the Attorney-General of the State of New York, and on reading and filing the affidavit of Laurence H. Doorly, sworn to on the 25th day of April, 1910, and the certificate of the clerk of the county of New York, annexed thereto, dated April 23, 1910, by which it appears that no exceptions to said report have been filed or served and that more than eight (8) days have elapsed since the filing of said report and service of notice thereof on the Attorney-General and on reading and filing the notice of the motion for this final order, dated the 14th day of April, 1910, and proof of service thereof of this proposed order on the Attorney-General, and after hearing Laurence H. Doorly, Esq., counsel for Wingate & Cullen, attorneys for the petitioner, in support of the motion, and no one opposing.

Now, on motion of Wingate & Cullen, Esqs., attorneys for the petitioner, it is

Ordered, that the said report of Daniel F. Cohalan, Esq., referee herein, be and it hereby is in all respects confirmed.

And it appearing to the satisfaction of the court that the allegations of the petition are true, that the said corporation, the J. B. Hackett Company, is insolvent and that it will be for the benefit of the stockholders and not detrimental to any public interests that it be dissolved, it is further

Ordered, that the said corporation, the J. B. Hackett Company, be and it hereby is dissolved; and it is further

Ordered, that Howard E. Brown be and he hereby is appointed permanent receiver of all the assets and property of said corporation with all the powers conferred by law on permanent receivers; and it is further

Ordered, that said receiver, before entering upon his duties as permanent receiver, make and file with the clerk of New York county a bond to the people of the State of New York with sufficient surety to be approved by the court, in the penal sum of one thousand dollars (\$1,000), conditioned for the faithful performance of his duties as such permanent receiver and for the due accounting of all moneys received by him; and it is further

Ordered, that said receiver deposit in the Fourth National Bank in the city of New York, all funds coming into his hands not needed for immediate disbursements; and it is further

Ordered, that the petitioners recover the sum of ninety-seven dollars and sixty-five cents (\$97.65), as and for their costs and disbursements herein, including the fees of the said referee and the stenographer upon the reference, to be taxed by the clerk and inserted herein and paid by the said receiver out of any funds coming into his possession.

Enter:

.....

(Title.) **Notice of Motion to Discharge Receiver.**

SIRS.—Please take notice that upon the receiver's account verified August 25, 1910, a true copy of which is herewith served upon you, upon the petition of Howard E. Brown, verified August 25, 1910, and upon the consent of Wingate & Cullen, attorneys for the petitioning directors herein, and of the United States Fidelity & Guaranty Company, surety hereto annexed, and upon all the papers and proceedings heretofore had herein, the undersigned will present said receiver's account for settlement and make a motion before this court at a Special Term, Part I. thereof, to be held in and for the county of New York at the County Court House in the borough of Manhattan, city of New York, on the 8th day of September, 1910, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order settling and allowing said receiver's account, granting said receiver an extra allowance, directing a distribution as to the fund in this proceeding, discharging said receiver, canceling his bond and discharging the surety thereon, and for such other and further relief in the premises as may be proper; and for the signature of the proposed order hereto annexed.

Dated,

Yours, etc.

.....

To

Permanent Receiver's Account of Proceedings and Report.

(Title.)

To the Supreme Court of the State of New York:

The petition of Howard E. Brown, the receiver herein, respectfully shows:

That by an order duly made herein and entered in the office of the clerk of the county of New York, on the 5th day of May, 1910, your petitioner was appointed permanent receiver in the above-entitled proceeding of all the assets and property of said corporation with all the powers conferred by law on permanent receivers.

That in pursuance of said order appointing your petitioner herein he duly caused to be filed with the clerk of the county of New York on the 13th day of May, 1910, a bond in the penal sum of one thousand dollars (\$1,000), conditioned for the faithful performance of his duties as such receiver, said bond having first been duly approved by a justice of this court, and thereafter on the 20th day of May, 1910, he duly filed in the office of the clerk of the county of New York his oath of office according to the law in such cases

made and provided and entered upon the discharge of his duties as such receiver.

That your petitioner has duly performed all of his duties as such receiver, and executed all of the trusts of his said office so far as he has been able and has collected all the assets of said corporation, to the best of his knowledge and belief. That after his qualification as such receiver he duly gave notice by advertisement in *The New York Law Journal*, pursuant to law, of his said appointment as receiver in this proceeding and requiring all creditors to file with said receiver before the 22d day of July, 1910, proofs of their claims against said corporation and requiring all persons holding any subsisting contracts of said corporation to present the same to said receiver by said date, and requiring all persons holding any assets or owing any money to said corporation to deliver or pay the same to said receiver by said date. Your petitioner annexes hereto, and makes a part hereof, an affidavit of John J. Cosgrove, verified June 23, 1910, marked exhibit "A," setting forth a copy of said notice dated June 8, 1910, and showing proof of due publication of the same.

That your petitioner duly gave notice of a meeting of creditors of said corporation and caused the same to be duly published in *The New York Law Journal* as required by law. That your petitioner annexes hereto and makes a part hereof marked exhibit "B," setting forth a copy of said notice dated June 9, 1910, and showing proof of the publication of said notice in said paper.

That thereafter on the 5th and 6th days of July, 1910, respectively, your petitioner mailed copies of the notice above mentioned and set forth in exhibit "A," hereto annexed, to all the debtors and creditors of said corporation known to your petitioner and which appear in the petition herein filed in the office of the clerk of the county of New York on the 21st day of January, 1910, to the addresses appearing opposite the names of said debtors and creditors respectively in said petition. That on said 5th and 6th days of July, 1910, respectively, your petitioner also mailed the notice set forth in exhibit "B," hereto annexed, to all the creditors of said corporation to the addresses respectively set opposite their names in said petition hereinabove mentioned.

That your petitioner has given due notice by advertisement in *The New York Law Journal* of the presentation of said receiver's account on the 6th day of September, 1910, before this honorable court and of your petitioner's intention to then and there apply to said court for an order settling said receiver's accounts, ordering the distribution of the funds in his hands after deducting the amount of his commission, and discharging the said receiver, vacating his bond and releasing the surety thereon. That said notice dated August 17, 1910, first appeared in said law journal on the 18th day of August, 1910. That your petitioner duly mailed a copy of said notice to all the creditors and stockholders of said corporation known to said receiver, or which appeared in said petition herein above mentioned to the addresses respectively set opposite the names of said creditors and stockholders respectively in said petition. That a copy of said notice marked exhibit "C" is hereto annexed and made a part hereof.

That according to the accounts of your petition there remains after paying the necessary expenses and charges of said trust, together with a proper compensation to the receiver, no assets of value for distribution among the creditors and stockholders of said corporation.

That in the performance of his duties as such receiver, your petitioner was engaged a great many days in converting into cash the assets of said corporation, collecting the outstanding accounts, going over the books of said corporation, preparing and mailing various notices to creditors, interviews with

his attorney in the preparation of the notices aforesaid, and in the preparation of various applications to this court for leave to sell portions of the assets of said corporation at private sales upon terms theretofore offered to said receiver by prospective purchasers for instructions regarding certain uncollectible accounts and for the confirmation of said receiver's agreement with his said attorney and in the preparation of said receiver's final account herein and the application to this court for the settlement thereof. That in the course of his duties as receiver, your petitioner wrote more than fifty letters to debtors of said corporation in an endeavor to obtain payment of their accounts and regarding the defenses set up by them to the claims of this corporation. That the assets of said corporation consisted of stock on hand, in which said corporation was dealing, consisting of steam fitting specialties, such as flue cleaners, packing tools, scraping and other tools, circulating pumps, oil filters and grate bars and also a large amount of office equipment consisting of thirty or forty articles, all of which were in a more or less worn and damaged condition. That it would have been impracticable for your petitioner to have sold the above-named assets of the above corporation at auction sale for the reason that as your petitioner was informed and believes it would have cost this estate nearly as much as would have been realized by said auction sale for the expenses thereof, such as publication of legal notices, storage, commissions to a licensed auctioneer and other expenses. That your petitioner, therefore, was occupied many days in obtaining purchasers for the said assets at reasonable prices and for that purposes interviewed a large number of persons and accompanied many of them to the office of said corporation for the purpose of inspecting said furniture and other articles. The selling of steam fitting specialties was very difficult for the reason that there are but comparatively few persons who would have any use for the same and your petitioner was unable to obtain any reasonable offers for the same or for most of the furniture and office fixtures of said corporation from second-hand dealers and sold all but seventy-five cents (\$.75) worth of said assets to persons desiring the same for their own use. That your petitioner was able, by his efforts as aforesaid, to obtain for said goods the sum of one hundred and twenty dollars (\$120), as appears by schedule of said receiver's account.

That the total amount of moneys received by your petitioner as such receiver was the sum of two hundred and ninety-three dollars and forty-two cents (\$293.42), and his total disbursements the sum of two hundred and nineteen dollars and seven cents (\$219.07), leaving a balance of seventy-four dollars and thirty-five cents (\$74.35), out of which must still be paid your petitioner's commissions as such receiver and the expenses of this accounting. The total amount of liabilities as proved before your petitioner is three thousand and eighty-six dollars and two cents (\$3,086.02). Your petitioner feels that his commissions of five per cent. (5%) on the total amount received by him as such receiver, fourteen dollars and sixty-seven cents (\$14.67), is not commensurate with the services he has been obliged to render as such receiver and that the amount remaining after paying this amount is too small to be apportioned among the creditors of this corporation on account of the amount of the liabilities, three thousand and eighty-six dollars and two cents (\$3,086.02).

Therefore, your petitioner prays that he be allowed said sum remaining in his hands as commissions and compensation as receiver.

That no suits or legal proceedings in respect to said corporation or receiver are now pending to the knowledge of your petitioner; nor is there any duty remaining to be performed by said receiver except to have his account finally settled and allowed.

That as to the amount to be paid to your petitioner it is respectfully sub-

mitted that the attorneys for the petitioning directors herein and the surety upon said receiver's bond have consented that upon the final determination of this proceeding your petitioner be allowed the sum of seventy-four dollars and fifty cents (\$74.50) in payment of his services and commissions as receiver herein, and your petitioner believes that the said sum in payment for his services and commissions is not reasonable and fair.

The consent of the said attorneys for the petitioners herein and of the surety upon the receiver's bond hereinabove referred to is hereto annexed marked "Exhibit D," and made a part hereof.

WHEREFORE, your petitioner prays that this court may finally settle and allow his accounts as such receiver and award to him the said sum of seventy-four dollars and thirty-five cents (\$74.35) remaining in his hands, as compensation for the performance of his duties and for an order directing that your petitioner be relieved and discharged as such receiver, his official bond canceled and the surety thereon released and discharged and for such other relief as may be proper in the premises.

Dated,, 1911.

(Add verification.)

Petitioner.

Receiver's Notice.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF THE J. B. HACKETT CO., A DOMESTIC CORPORATION.

To all whom it may concern:

Notice is hereby given that by decree entered in the office of the clerk of the county of New York, on May 5, 1910, in this proceeding, I was appointed by the Supreme Court of the State of New York permanent receiver of the J. B. Hackett Company, and of all the property and effects of said corporation, and that I have qualified as such receiver, and I do hereby require:

First. All persons indebted to said corporation to render an account to me, at my office, No. 2 Rector street, borough of Manhattan, city of New York, by the 22d day of July, 1910, of all debts and sums of money owing by them respectively, and to pay the same to me.

Second. All persons having in their possession any property or effects of said corporation to deliver the same to me at my said office by said date.

Third. All creditors of said corporation to deliver their respective accounts and demands to me at my office by said date.

Fourth. All persons holding any open or subsisting contract of said corporation to present the same in writing and in detail to me at my said office by said date.

Dated,, 1911.

Receiver.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
County of New York, }

JOHN H. COSGROVE, being duly sworn, says that he is the principal clerk of the publisher of *The New York Law Journal*, a daily newspaper printed and published in the county of New York; that the advertisement hereto annexed has been regularly published in the said *The New York Law Journal* once a week for three successive weeks, commencing on the 9th day of June, 1910.

(Jurat.)

Notice of Meeting of Creditors.

(Title.)

To all whom it may concern:

Take notice that the undersigned, permanent receiver of the above corporation, appointed by decree entered in the office of the clerk of New York county, on the 5th day of May, 1910, in this proceeding, hereby calls a general meeting of the creditors of said corporation to be held on the 12th day of August, 1910, at 2 o'clock in the afternoon, at my office, room 418, No. 2 Rector street, borough of Manhattan, New York city.

Dated,, 1910.

.....
Receiver.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
County of New York, }

JOHN J. COSGROVE, being duly sworn, says that he is the principal clerk of the publisher of *The New York Law Journal*, a daily newspaper printed and published in the county of New York; that the advertisement hereto annexed has been regularly published in the said *The New York Law Journal*, once a week for three successive weeks commencing the 10th day of June, 1910.

(Jurat.)

Notice to the Creditors of and all Persons Interested in the
J. B. Hackett Company.

(Title.)

PLEASE TAKE NOTICE, that a full and accurate account, under oath, of all the proceedings of Howard E. Brown, as permanent receiver of the above-named corporation, will be presented to the Supreme Court of the State of New York, at a Special Term, Part I. thereof, to be held at the County Court House, in the borough of Manhattan, city of New York, on the 8th day of September, 1910, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and that a motion will then and there be made that the said account be allowed and passed and decreed to be final and conclusive upon all the creditors of said corporation and upon all persons who may have claims against it upon any open or subsisting engagements, and upon all stockholders of said corporation or other persons interested therein, and that the court direct the settlement of said account by reference or otherwise, and the payment of the moneys remaining in the hands of said receiver after deducting the amount of his commissions and the expenses of said accounting to those found to be entitled thereto, as a final dividend and that the same so paid and distributed, the said receiver be discharged, his bond vacated and the sureties therein released, or for such other relief as may be proper.

Dated,, 1910.

.....
Receiver.

Order Settling Accounts of Receiver.

(Title.) (Special term caption.)

Application having been made to this court by the attorney for the receiver herein for an order settling and allowing said receiver's account, granting said receiver an extra allowance, canceling his bond and discharging said receiver, and said motion coming regularly on to be heard,

Now, on reading and filing the notice of said motion, dated August 25, 1910, the petition of Howard E. Brown verified August 25, 1910, and the consent of Wingate & Cullen, attorneys for the petitioning directors herein and of the United States Fidelity & Guaranty Company, surety on said

receiver's bond, thereto annexed, and the receiver's account herein verified August 25, 1910, with proof of due service thereof upon Wingate & Cullen, attorneys for the petitioning directors herein, upon the Attorney-General of the State of New York and upon the United States Fidelity & Guaranty Company, surety upon said receiver's bond, and upon reading and filing the affidavit of John J. Cosgrove verified September, 1910, showing proof of due publication of notice by said receiver of the presentation of said receiver's account for settlement, and upon all other proceedings heretofore had herein and after hearing John H. Hilliard, attorney for said receiver, in support of said motion and appearing herein in opposition thereto and due deliberation having been had thereon,

Now, on motion of John H. Hilliard, attorney for the receiver herein, it is

Ordered, that this motion be and the same hereby is in all respects granted and that the said final account of Howard E. Brown as permanent receiver be and the same hereby is settled, ratified and confirmed, and that a summary statement thereof is as follows:

Summary.

Gross receipts as shown by Schedule A.....	\$293 42
Total expenditures as shown by Schedule B.....	219 07
Leaving a balance of.....	<u>\$74 35</u>

and that said receiver be and he hereby is granted and allowed said sum of seventy-four dollars and thirty-five cents (\$74.35), the balance remaining in his hands, as an allowance to him for his services as such receiver and for the expenses of this accounting and that he be and he hereby is discharged as such receiver and his official bond canceled and the United States Fidelity & Guaranty Company, surety thereon, be and they hereby are discharged and relieved from any further liability thereunder.

Enter:

.....,
Justice Supreme Court.

Order to Show Cause Appointing Temporary Receivers with Injunction.

(Special Term Caption.)

IN THE MATTER OF THE APPLICATION OF THE
KNOXBORO CANNING COMPANY FOR
A VOLUNTARY DISSOLUTION.

On reading and filing the petition of Warren G. Strong (insert names), as directors of the Knoxboro Canning Co., a corporation created under the laws of this State, having its principal office at Knoxboro, this State, and the schedules thereto annexed, duly verified by the petitioners on the 24th day of December, 1910, and also on filing due notice of service upon the Honorable, the Attorney-General of the State of New York, of said motion papers with a copy of this order, as prepared.

Now, on motion of Louis M. Martin, attorney for the said petitioners, it is

Ordered, that Warren G. Strong and Alvin W. Strong, of Augusta, Oneida county, N. Y., be and they hereby are appointed temporary receivers of the said corporation, the Knoxboro Canning Co., to take charge of the affairs and the property of the said corporation, with the usual powers and duties of a receiver in such case.

That before disposing of any of the property of the said corporation, they execute in the usual form a bond, with sufficient sureties to be approved by

this court, in the penal sum of forty-one thousand dollars (\$41,000); it is further

Ordered, that all persons interested in the said corporation show cause before this court, at a Special Term thereof, to be held at the County Court House in the city of Utica, Oneida county, N. Y., on the 18th day of February, 1911, at ten o'clock in the forenoon of that day, why said corporation should not be dissolved; it is further

Ordered, that a copy of this order be published at least once in each week for the three weeks immediately preceding the 18th day of February, 1911, in the *Oriskany Falls News*, a newspaper published in the village of Oriskany Falls, Oneida county, N. Y., wherein this order is entered, and in the official paper at Utica, N. Y.; it is further

Ordered, that the Knoxboro Canning Company, its stockholders, directors, managers, officers, agents and servants, be and they are hereby enjoined and restrained from collecting or receiving any debt or demand, or in any way transferring or delivering to any person any money, property, or effects of the corporation during the pendency of these proceedings, except by express permission of the court.

And the said corporation and said directors, stockholders, managers and officers, agents and servants be and they are further enjoined and restrained from exercising any of the corporate rights, privileges or franchises of the said corporation during the pendency of these proceedings, except by express permission of this court; and it is further

Ordered, that all creditors and persons having claims and demands against the said corporation be, and they hereby are enjoined and restrained from commencing an action at law or from prosecuting any suits or claims against the said corporation, or from in any way interfering with the property and assets of this corporation, until the further order of this court.

Enter:

Petition for Dissolution.

To the Supreme Court of the State of New York:

The petition of Warren G. Strong, Alvin W. Strong, John G. Vaughn, Virgil E. Van Evera, Samuel H. Farman, Emory I. Stone, Phillip J. Rever, Daniel H. Bellinger, Edward G. Smith, of the town of Augusta, Oneida county, N. Y., respectfully shows to this court:

That they are the majority of the directors, having the management of the concerns of the Knoxboro Canning Company, created under the laws of the State of New York.

That your petitioners have discovered that the stock effects and other property of said corporation are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security to those who may deal with it; that the business for seven years last past has not proved a paying venture, and the immediate directors of the corporation have been obliged to personally assume a large outstanding obligation in order to keep the business continuing, and that they have done so without any reasonable assurance of being repaid or obtaining any return for the use of their credit and money, which they refuse to do longer, in the future, and without they extend such assistance, the corporation will not be able to continue its legitimate business, as it has no individual credit, sufficient to raise money to continue its operation; and they deem it beneficial to the interests of the stockholders that the said corporation should be dissolved.

That the principal office of the said corporation is located in the town of Augusta, Oneida county, N. Y.

That your petitioners have annexed to this petition a schedule marked schedule "A" containing a statement of the matters required by section 2421

of the Code of Civil Procedure, as far as your petitioners know or have the means of knowing the same:

WHEREFORE, your petitioners pray for a final order of this court, dissolving the said corporation, and appointing a receiver of its property and effects, and for such other and further relief as may be proper.

Dated, town of Augusta, N. Y., *December 24, 1910.*

(Signed and verified.)

(Schedule "A" annexed.)

Receiver's Bond.

Know all men by these presents, that we, Warren T. Strong and Alvin W. Strong, as principals, and Fletcher A. Gary, Charles H. Phister, Charles W. Chushman, George P. Landford, Francis A. Cody and David B. Case, as sureties, all of Augusta, and Vernon, Oneida county, N. Y., are held and firmly bound unto the people of the State of New York in the sum of forty-one thousand dollars (\$41,000), to be paid to the said people.

For which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of January, 1911.

WHEREAS, at a Special Term of the Supreme Court held at the County Court House in the city of Utica, N. Y., on the 7th day of January, 1911, in a proceeding for the voluntary dissolution of the Knoxboro Canning Company, said Warren G. Strong and Alvin W. Strong were duly appointed temporary receivers of all the property, debts, equitable interests, rights and things in action, effects and estate, real and personal of the said Knoxboro Canning Company, pursuant to the provisions of the Code of Civil Procedure.

Now, therefore; the conditions of this obligation are such that if the said Warren G. Strong and Alvin W. Strong shall faithfully discharge their duties as such receivers, and duly account for all moneys or property of every kind, received by them as such receivers, then this obligation shall be void; otherwise to be in full force and effect.

(Signatures.)

(Acknowledgment, justification and approval by justice.)

Order Extending Powers of Temporary Receivers.

(Title.)

(Special term caution.)

On reading and filing the petition of Warren G. Strong and Alvin W. Strong, temporary receivers of the above-named corporation, the Knoxboro Canning Company, and also on filing due notice of service upon the Honorable, the Attorney-General of the State of New York, of said motion papers, with a copy of this order, as prepared.

Now, on motion of Louis M. Martin, attorney for the said petitioners; it is

Ordered, that the said Warren G. Strong and Alvin W. Strong, heretofore appointed temporary receivers of the said corporation, have in addition to the power already conferred upon them the power and authority, and be subject to the duties of permanent receivers, and that they possess such power and authority in all regards, except that they shall not make any final distribution among creditors and stockholders, except as hereafter ordered; it is further

Ordered, that the said Warren G. Strong and Alvin W. Strong, as such receivers, have full power and authority to lease or sell and dispose of all the property and assets of the said corporation, real and personal, whatsoever and wheresoever, at public or private sale, and to such person or persons as they may deem best, and at such time and places as they may deem proper, for the best interests of the stockholders and creditors of the said corporation, subject to the approval of this court, as to the sale of the said real estate; that before executing any title in and to the real estate, the said receivers report

to this court the terms of the sale, the price obtained for the same, the name of the purchaser or purchasers thereof for approval; that "The National Bank of Vernon, N. Y." is hereby designated as the place of deposit of all funds.

Findings by Court on Application for Dissolution.

(Title.)

(Special term caption.)

The above-entitled proceeding having been made returnable before this court this day, by an order of this court made at a Special Term thereof, held at the County Court House in the city of Utica, N. Y., on the 7th day of January, 1911, requiring all persons to show cause before this court, at this term, why the Knoxboro Canning Company should not be dissolved, and due proof having been made before this court by affidavit of service which is hereto annexed of the publication of said order as in said order required, and by the due and proper service of said order on the stockholders, creditors and all persons interested in said corporation pursuant to statute, and also on filing due proof of service of this order upon the Attorney-General of the State of New York, on the 18th day of January, 1911, and having been attended by L. M. Martin, attorney for the petitioners herein, and having duly received and filed the original petition herein, and having duly heard the proofs and allegations of the parties, and taken testimony in relation to the matters set forth in the petition, and also in regard to such other matters and things pertaining to the affairs of said corporation as were brought before me, I do hereby find and decide the following facts and conclusions of law.

1. That the Knoxboro Canning Company is a domestic corporation formed under the Business Corporations Law in pursuance of the provisions of chapter 691 of the laws of the State of New York and that the articles of incorporation of said company were duly recorded in the clerk's office of the county of Oneida, February 16, 1899, in Book No. 3 of Certificates of Incorporation, page 253.

2. That on the date of the execution of the petition herein, namely, December 24, 1910, the following named persons were the directors of said corporation duly elected as such and acting in that capacity, namely (insert names), and that the above-named persons constituted and were the entire board of directors, having the management of the Knoxboro Canning Company on said 24th day of December, 1910, and duly executed, acknowledged and presented the original petition on file in the clerk's office of the county of Oneida, and on which this order to show cause was based.

3. That the annexed and original petition on file herein in this proceeding is just and true, with the exception of the several items of personal property contained in the additional schedules of assets and liabilities which are hereto annexed, and with the execution of the several debts of said corporation, all of which have been proved before me this day, and the said original schedules heretofore filed with the petition herein are hereby amended and corrected accordingly.

4. That the annual report of said corporation, for the year 1907, showed as follows: Liabilities \$33,972.81; resources \$26,740.25; deficit \$7,232.56. For the year 1908, liabilities \$39,807.34; resources \$34,991.71; deficit \$4,815.73. For the year 1909, liabilities \$38,221.25; resources \$32,213.84; deficit \$6,007.41.

5. That the following notes outstanding against said corporation have been running since the times stated as follows, to wit: Strong note \$1,000, January 2, 1905; Strong note \$1,000, January 15, 1902; Strong note \$7,000, May 1, 1900; Oriskany Falls Bank note \$3,500, August 21, 1907; C. W. Clark note \$2,000, June 21, 1907; Vernon Bank note \$5,000, June 8, 1900; Vernon Bank note \$5,000, June 19, 1900.

6. That attached hereto and marked assets and liabilities is a statement of

the effects, credits and other property and of the debts and engagements of the said corporation, and of all other matters pertaining to its affairs.

7. That the operating plant of said corporation is situate in the village of Knoxboro, town of Augusta, county of Oneida and State of New York, and is four miles from the nearest point of shipment by railroad, and that said plant and its equipment together with the machinery therein, with the exception of the pea grader, has been in service and operation for the past ten years.

8. That according to the schedules marked liabilities and assets hereto annexed, the said Knoxboro Canning Company as to its assets and liabilities at this date stands as follows: Total liabilities \$26,309.93; total assets, including plant, \$20,188.72; deficit \$6,121.21.

9. That of the above-mentioned assets \$2,408.87 are to be classed as disputed bills receivable, the same being for goods sold that are not yet accepted, and cannot be considered as an actual asset.

10. That classing the above-named disputed accounts as an asset not available, the total deficit at the present time and of this date would be \$8,460.08.

11. That the stock of said company is held in small amounts by approximately eighty-five farmers in the vicinity of Knoxboro, and has been managed as a co-operative canning factory during its operation.

That no dividend on said stock has ever been paid.

Conclusions of Law.

First. That the said Knoxboro Canning Company is insolvent, and that it would be beneficial to the interests of the stockholders and not injurious to the public interest that the same should be dissolved.

Second. That a judgment of dissolution should be entered herein in the usual form and the receivers of said corporation duly appointed according to law.

Order for Dissolution and Appointing Permanent Receivers.

(Title.)

(Special term caption.)

The petitioners (naming them) having upon their duly verified petition and schedules procured on the 7th day of January, 1911, an order from this court, dated that day, appointing Warren G. Strong and Alvin W. Strong, receivers of said corporation, and further ordering and directing that all parties interested in the Knoxboro Canning Company, to show cause at a Special Term of this court, on the 18th day of February, 1911, at ten o'clock in the forenoon of that day, why said corporation should not be dissolved, and said motion having come on to be heard at this term of court, held this day by the undersigned, and the said petitioners having appeared herein by Louis M. Martin, their attorney, and due notice of this application having been given to the Attorney-General of the State of New York, and due proof of the service of this order having been made and filed herewith on all the stockholders and creditors and persons interested therein, and due proof and proper publication of said order having been made and filed, and the court having heard the evidence and allegations and the proofs of the parties interested in said corporation, and having made its decision in writing, according to law, and it appearing to the court, and the court having decided, that the said Knoxboro Canning Company is insolvent, and that it will be beneficial to the interests of the stockholders, creditors and all persons interested in said corporation that the same be dissolved, and not injurious to the public interest, for the following reasons, to wit:

That said corporation commenced business on or about the year 1900, and that during said year it assumed liabilities and notes of seventeen thousand dollars (\$17,000), which notes have never been paid, except the interest yearly, and that at no time has said corporation shown a sufficient surplus, or had a

sufficient surplus to pay any dividend on its stock, but on the other hand has shown a continual deficit, and that at the present time the outstanding notes against said corporation aggregate to the sum of twenty-five thousand four hundred and seven dollars and fifty cents (\$25,407.50), and that its total liabilities is the sum of twenty-six thousand three hundred and nine dollars and three cents (\$26,309.03), and that its assets aggregate the sum of twenty thousand one hundred and eighty-eight dollars and seventy-two cents (\$20,188.72), leaving a deficit of at least six thousand one hundred and twenty-one dollars and twenty-one cents (\$6,121.21), with the portion of the assets above referred to, not available by reason of a dispute in the amount due said company and in the quality of the goods sold.

Now, therefore, upon the petition herein dated December 24, 1910, the order to show cause herein, dated January 7, 1911, the further petition for the enlargement of the powers of the temporary receivers, dated January 16, 1911, the order granting and enlarging said powers, dated January 21, 1911, with proof of the proper notice of all proceedings upon the Attorney-General of the State of New York.

On motion of Louis M. Martin, attorney for the petitioners, it is hereby

Ordered, that the Knoxboro Canning Company, of Knoxboro, Oneida county, N. Y., be and the same is hereby dissolved, and that Warren G. Strong and Alvin W. Strong, heretofore appointed temporary receivers of the said corporation, be and they are hereby appointed permanent receivers of said corporation and of the property thereof, and their acts as such temporary receivers be and the same hereby is confirmed and ratified both as temporary receivers and with the enlarged powers as permanent receivers given by the order of this court, of January 23, 1911, and entered in the clerk's office of the county of Oneida on said day and that said permanent receivers have all the powers and liabilities of such receivers; it is further

Ordered, that Warren G. Strong and Alvin W. Strong, as such receivers, have full power and authority to lease or sell and dispose of all the property and assets of said corporation, real and personal, whatsoever and wheresoever, at public and private sale, and to such person or persons as they may deem best and at such times and places as they may deem proper, for the best interest of the stockholders and creditors of said corporation, subject to the approval of this court as to the sale of said real estate; that before executing any title in and to the real estate, the said receivers report to this court the terms of the sale, the name or names of the purchaser or purchasers thereof for approval; that the National Bank of Vernon, N. Y., be and the same is hereby designated as the place of deposit of all funds: it is further

Ordered, that the said receivers shall give notice of their appointment, which notice shall contain the matters required by law in notices of trustees and insolvent debtors, and in addition thereto, shall require all persons holding any open or subsisting contracts of such corporation, present the same in writing and in detail to such receivers, at a time and place in such notice specified; it is further

Ordered, that all parties interested in the Knoxboro Canning Company, be and they are hereby enjoined from in any way using, controlling, interfering with or incumbering the said company's property, and from collecting any debts due said company, or paying out any money belonging to said company, until the further order of this court; it is further

Ordered, that the petitioners recover their costs and disbursements of this proceeding, and that the amount thereof be paid by the said receivers out of the moneys that may come into their hands, the same to be taxed by the clerk.

Enter:

(Title.) Petition for Order to Sell Property.

To the Supreme Court of the State of New York:

The petition of Warren G. Strong and Alvin W. Strong, as temporary receivers of the above-named corporation, respectfully shows to the court:

That heretofore and by an order of this court, made at a Special Term thereof on the 7th day of January, 1911, your petitioners were duly appointed temporary receivers of the aforesaid corporation, to take charge of the affairs and property of the said corporation, with the usual powers and duties of a receiver in such case.

That in and by the terms of the said order your petitioners were required to execute in the usual form a bond, with sufficient securities to be approved by this court, in the sum of forty-one thousand dollars (\$41,000), before disposing of the property of the said corporation.

That the order so appointing your petitioners was entered in the clerk's office of the county of Oneida, on the said 7th day of January, 1911, and that said bond, duly approved by this court, was filed in the office of the said clerk of the county of Oneida on the 13th day of January, 1911, said bond having been approved, as stated, by Mr. Justice P. C. J. DeAngelis, and that now said petitioners are duly qualified, acting, temporary receivers.

That attached hereto and marked schedule "A" is a list of the liabilities and assets of said corporation, exclusive of the plant.

That by referring to the petition on file in this proceeding, and to schedule "A" hereto annexed, it will be seen that Mr. Warren G. Strong, one of the petitioners herein, is the owner and holder of nine thousand eight hundred dollars (\$9,800) worth of the notes mentioned in schedule "A" hereto annexed, and is also the indorser on all of the other commercial papers, amounting in all to the said sum of twenty-four thousand five hundred dollars (\$24,500), and that particularly the said Warren G. Strong is responsible for the two Vernon Bank notes for ten thousand dollars (\$10,000), he being one of the directors of the said Vernon Bank and primarily responsible for the loan; that outside of the bank notes and the notes held by one of your petitioners the indebtedness does not exceed one thousand six hundred dollars (\$1,600), of which seven hundred dollars (\$700) is preferred under the statute, and that there is now sufficient cash in the hands of your petitioners to fully pay the same.

That it will be observed by reference to schedule "A" annexed that the liabilities exceed the assets in an amount of nearly ten thousand dollars (\$10,000), exclusive of the plant.

That the said plant was constructed about ten years ago, and has been in operation since. At the time it was well constructed and equipped with what was then modern canning machinery; a portion of the construction of the same was performed by the stockholders of the corporation, being the farmers in the neighborhood of the said factory, who worked out the amount of their stock in the hauling of lumber and supplies and in work on the building. That the probable cost of said factory was about fifteen thousand dollars (\$15,000).

That the machinery and equipment in the said factory at the present time is not modern, and is old machinery, although kept in good repair.

That the said factory is located about six miles from the nearest railroad, over a hilly country, which occasioned in the past a yearly expenditure of about one thousand six hundred dollars (\$1,600) for hauling freight and supplies and delivering products.

That it will be seen by an examination of the assets under schedule "A" annexed, that it is a class of property which if not disposed of during the proper season will greatly decrease in value and some of it be rendered practically worthless.

That your petitioners have an offer of five thousand dollars (\$5,000) for the plant, providing the deal can be closed at once, the purchaser to pay cash on the delivery of the deed; the said purchaser to also take at the inventory price the cans, boxes, pea seed and other supplies mentioned in the said schedule, together with the labels if the purchaser can assume the same name after this dissolution, and while the amount stated is less than the property is worth, your petitioners believe that it is the best sale that can be made of the same under existing conditions, and as your petitioners are by far the heaviest creditors, they are desirous of obtaining the best possible price for the property; that in the judgment of your petitioners it would be a very great mistake to allow the sale of this property to run along until the return day of the order to show cause, namely February 18, 1911, for the reason that during this month a person who intends to operate a canning factory next season must make contracts with the farmers for peas and corn for the ensuing year, must purchase seed for distribution to the amount of over one thousand dollars (\$1,000) and must hire a superintendent, whose salary ranges from one thousand two hundred dollars (\$1,200) to one thousand five hundred dollars (\$1,500) per year, and all of this must be done during the present month, in order to insure a successful running of the factory next season.

That in the judgment of your petitioners, if the said factory is not sold, and is allowed to stand idle for a year, it will simply become junk and of no particular value, owing to its location and to the fact that its machinery is old.

That during the past five years the said factory has barely met its running expenses, or suffered loss, and the entire burden of the financial responsibility has been borne by Mr. Warren G. Strong and Alvin W. Strong, who was the president of the corporation. That if the said property is not sold, a much larger burden or loss will fall upon your petitioners and upon all the board of directors, who are the voluntary indorsers upon all of the paper of the said corporation, amounting in all to the sum of twenty-four thousand five hundred dollars (\$24,500), and that if said property is sold, your petitioners will be able to pay a fairly good percentage on said indebtedness, so that it will leave less for your petitioners and the board of directors individually, to make up.

That if said sale cannot become consummated for five thousand dollars (\$5,000), your petitioners deem it for the best interests of the said corporation to sell or rent the same at once at either public or private sale, for the best price that can be obtained for the said property.

WHEREFORE, your petitioners pray for an order of this court, conferring upon them the power and authority, and subject them to the liabilities and duties of permanent receivers of the said corporation, and as such that they may have power to loan or sell and dispose of all the property and assets of the said corporation, real and personal, whatsoever and wheresoever, at public or private sale, and to such person or persons as they may deem for the best interests of the stockholders and creditors of the said corporation, subject to the approval of this court as to the sale of the said real estate.

Dated, *January 16, 1911.*

(Add verification.)

.....
Petitioners.

(Title.)

Report of Sale of Property.

To the Supreme Court of the State of New York:

The report of Warren G. Strong and Alvin W. Strong, as receivers of the above-named corporation, respectfully shows:

That heretofore and by an order of this court made on the 7th day of January, 1911, your petitioners were appointed temporary receivers of the above-named corporation, and that by an order of this court, dated on the 18th day of February, 1911, said corporation was dissolved and your petition-

ers duly appointed permanent receivers thereof, and that they duly qualified as such receivers, and are now such receivers of said corporation, duly qualified and acting.

That under an order of this court, made on the 6th day of March, 1911, made at a Special Term thereof, at Utica, N. Y., the real property of the above-named corporation, consisting of about two acres of land, the canning plant and all machinery connected therewith was ordered to be sold at public auction at the front door of the Van Evera House in the village of Knoxboro, Oneida county, N. Y., on the 2d day of June, 1911, at eleven o'clock in the forenoon of that day, due notice of the time and place of the said sale being therein provided.

That in accordance with the terms of said order, we caused public notice of said time and place of sale to be given by publishing a notice of said sale at least fourteen days before the date of the same in the *Oriskany Falls News* and *Utica Daily Press* published at Oriskany Falls and Utica, N. Y., once a week for two weeks prior to said date, and the *Canner and Dried Fruit Packer* of Chicago, Ill., and in the *Trade* of Baltimore, Md., once a week for one week prior to said date of sale, and caused a copy of said notice of sale to be posted up in three public places in the town of Augusta, Oneida county, N. Y., at least fourteen days prior to the aforesaid date of sale mentioned, affidavits of said publication and posting are hereto annexed and made a part of this petition and report.

That on the 2d day of June, 1911, the day on which the said property was so advertised to be sold, as aforesaid, we personally attended at the time and place fixed for such sale and exposed said property for sale at public auction to the highest bidder, and the said property was then and fairly struck off to Louis M. Martin, Clinton, N. Y., for the sum of four thousand eight hundred dollars (\$4,800), he being the highest bidder for the same, which is the highest amount that we have been able to obtain for the sale of said property, and which we deem for the best interests of all persons interested to accept.

That hereto annexed are the terms and conditions of sale signed by the respective parties, namely the receivers and the purchaser, and which are made a part of this petition and report.

Dated,

(Add verification.)

.....

Receivers.

Order for Conveyance.

(Title.)

(Special term caption.)

An order having been duly made in this proceeding by the Special Term of the Supreme Court of the State of New York, on the 6th day of March, 1911, that the real property of the above-named corporation be sold at public auction on the 2d day of June, 1911, at Knoxboro, Oneida county, N. Y., and that notice of the time and place of such sale be given as therein provided; and it appearing by the report and petition of the receivers herein, duly presented this day (here insert recitals).

Now, on reading and filing the report of sale and petition for confirmation of the same by the said receivers, verified on the 2d day of June, 1911, together with the terms of sale attached, and due proof of the service of the notice of this application on the Attorney-General of the State of New York, with a copy of this proposed order;

On motion of Louis M. Martin, attorney for the said receivers,

Ordered, that the said report of sale be, and the same hereby is, ratified and confirmed; it is further

Ordered, that the said receivers, Warren G. Strong and Alvin W. Strong, in their official capacity as such receivers, execute, acknowledge and deliver to the said Sanford F. Sherman a good and sufficient deed and conveyance of

all of the real estate of the above-named corporation, consisting of about two acres of land, the canning plant, and all machinery and fixtures connected therewith, and mentioned in said report of sale, upon his complying with the terms and conditions attached to the said report of sale; it is further

Ordered, that the proceeds received from such sale be deposited in the National Bank of Vernon, N. Y., subject to the further order of this court.

Enter:
Justice Supreme Court.

Report and Account of Receivers.

(Title.)

To the Supreme Court of the State of New York:

We, Warren W. Strong and Alvin W. Strong, of Knoxboro, county of Oneida and State of New York, do hereby respectfully report and surrender the following account of all our proceedings as temporary and permanent receivers of the above-named corporation:

First. That we were duly appointed temporary receivers of the above-named corporation by an order of this court, made at a Special Term of the Supreme Court held at the courthouse in the city of Utica, N. Y., on the 7th day of January, 1911, and which was duly entered in the Oneida county clerk's office.

Second. That in accordance with the provisions of said order we duly filed our bond in said Oneida county clerk's office, duly approved.

Third. That in and by an order made at a Special Term of the Supreme Court, held at the courthouse in the city of Utica, N. Y., on the 21st day of January, 1911, and duly entered in the Oneida county clerk's office, we were duly appointed permanent receivers of the above-named corporation.

Fourth. That immediately upon the order being entered, giving us the powers of permanent receivers, we gave notice, according to law, that we had received such appointment and required all persons indebted to the corporation to render an account before us at a time then fixed, and requiring all persons having any property of the corporation to deliver the same to us, and requiring all creditors of the corporation to deliver their accounts and demands against the corporation to us, and also all persons holding any contract to present the same in writing, and then we caused such notice to be printed once a week for three weeks according to law.

Fifth. That pursuant to said order of this court, we proceeded to take control of the assets of the said corporation.

Sixth. That by an order of this court made at a Special Term thereof, held at the city of Utica, N. Y., on the 6th day of May, 1911, we were authorized to sell at public auction all the real property of said corporation.

That pursuant to said order we gave at least fourteen days' public notice of the time and place of sale and by posting notices thereof in three public places in the town of Augusta, Oneida county, N. Y., and by publishing for two weeks in the *Oriskany Falls News* of Oriskany Falls, N. Y., the *Utica Daily Press* of Utica, N. Y., the *Canner and Dried Fruit Packer* of Chicago, Ill., and in the *Trade* of Baltimore, Md.

That pursuant to said order we sold said property at public auction to Sanford F. Sherman of Utica, Oneida county, N. Y., for the sum of five thousand dollars (\$5,000).

Schedule 1, hereto annexed, contains a full account of all moneys and property received or collected by us, or with which we are chargeable.

Schedule 2, hereto annexed, contains a full account of all the wages of employees and salaries paid by us, and expenses incurred by us in the conduct of the business under the order of the court. And of all other moneys paid by us for expenses in these proceedings of every name and nature.

Schedule 3 contains a statement of the balance of moneys in our hands. And that also shows the amount of same that was derived from the sale of property.

Seventh. That a notice for presentation of our account, as receivers of the above named corporation, a copy of which is as follows:

Notice to the Creditors and All Parties Interested in the Knoxboro Canning Company.

TAKE NOTICE, that a full and accurate account of all the proceedings of the receivers of the above-named corporation, on oath, will be presented to the Supreme Court of the State of New York, at a Special Term thereof, to be held in the city of Utica, Oneida county, N. Y., on the 7th day of October, 1911, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the same be allowed and decreed to be final and conclusive upon all the creditors of said corporation, and upon all persons who may have claims against them. Upon any open or subsisting engagement, and upon all stockholders of said corporation, and that said receivers be discharged and their bond vacated.

Dated, Clinton, N. Y., September 15, 1911.

WARREN G. STRONG,

ALVIN W. STRONG,

Receivers.

LOUIS M. MARTIN, *Attorney*, Clinton, Oneida, County, N. Y.

was duly published as prescribed by law, printing said notice for at least once a week for three successive weeks in the *Oriskany Falls News*, being a newspaper published in the county in which the principal office of the said corporation is located.

Eighth. That no money, property or effects other than stated in said schedules have come into our hands or possession, and that no appearance by attorneys have been received by us or served on us, except as hereto annexed.

Ninth. That no accounts or demands against said corporation or any open or subsisting contracts with said corporation have been presented to us, except as shown in the schedules, and no creditors of said corporation except as shown therein.

All of which is respectfully submitted.

Dated, Clinton, N. Y., September 30, 1911.

(Signed and verified.)

Order of Reference as to Receivers' Account.

(Title.)

(Special term caption.)

On reading and filing the receivers' account of the proceedings herein, and the exhibits and vouchers accompanying the same, with the proof of service according to law, and upon proof of the due notice of a copy of said report and papers accompanying the same on the Hon. Thomas Carmody, Attorney-General of the State of New York;

Ordered, that said account be and the same hereby is referred to William K. Harvey, an attorney-at-law of Utica, N. Y., who is hereby appointed a referee to hear and examine the proofs, vouchers and documents connected with said account, and who is hereby ordered to report the same fully to this court with all convenient speed.

Report of Referee upon Receiver's Account.

(Title.)

To the Supreme Court of the State of New York:

I, the undersigned referee, to whom a reference was made by an order of this court made at a Special Term thereof, held in and for the county of Oneida,

at the city of Utica, N. Y., on the 7th day of October, 1911, ordering me to hear and examine the proofs, vouchers and documents connected with the accounts of the receivers herein, and to report the same fully to this court with all convenient speed, do hereby respectfully report:

First. That due proof was made before me of the notice of the presentation of this account to the Special Term in the newspaper in which notices of dividends had been inserted, for three weeks before such presentation, and also due proof of service of said notice on the sureties on the official bond of the said receivers. The said proofs are annexed to the final account filed herewith and made a part of this report.

Second. That on the 10th and 16th days of October, 1911, at my office in the Martin Building, Utica, Oneida county, N. Y., I proceeded to a hearing in the matter so referred to me. On said hearing there appeared Warren G. Strong of Knoxboro, Oneida county, N. Y., one of the receivers, and the receiver who had the management and control and the adjustment of said receivership; that he was attended by Louis M. Martin, attorney-at-law of Clinton, N. Y., who is the attorney for the receivers herein. That on said hearing I heard the proofs and allegations of the said parties and took the testimony in relation to the matter set forth in the petition, and also in regard to such other matters and things pertaining to the affairs of the said corporation as were brought before me; that I examined the proofs, vouchers and documents offered for or against said account, which testimony duly certified by me is hereto annexed.

Third. I further find and report that the schedule mentioned in said account as schedule No. 1 contains all of the receipts of the receivers of the said corporation that the receivers have received and deposited, with the exception of sixty-one dollars and thirty cents (\$61.30) received since the account was made up, sixty-eight dollars and eighty-eight cents (\$66.88) rebate still due on insurance and nineteen hundred and fifty-two dollars (\$1,952) paid in by the New Hartford Canning Company, making a total receipt of twenty-one thousand and two dollars and nine cents (\$21,002.09).

Fourth. I further find and report that the schedule mentioned in said account as schedule No. 2 contains all of the payments made by said receivers on the outstanding obligations, which have been fully paid except as hereinafter reported.

Fifth. That at the time the receivership went into effect the outstanding obligations consisted of labor account, a quantity of pea seed which was assumed by the purchaser of the canning company plant, and twenty-four thousand five hundred dollars worth of notes with accrued interest, held as follows: (Insert names with amounts).

That all of the labor bills which were preferred have been paid, and all of the expenses of disposing of the plant and the canning stock, together with rebate on damaged goods, have been fully paid; with the exception of a claim of W. R. Owens & Son for thirty dollars (\$30), which was presented since the completion of this account, and that there has also been paid on the existing indebtedness not preferred, which was the sum of twenty-four thousand five hundred dollars (\$24,500), a dividend of 75 per cent. total, and that the total payments made amount in all to the sum of nineteen thousand six hundred and seven dollars and twenty-five cents (\$19,607.25) as stated in schedule No. 2.

Sixth That the receivers' account stands and is passed as follows:

Total receipts of receivership.....	\$21,002 09
Total payments of receivership.....	19,607 25

\$1,394 84

Seventh. That the said balance in the hands of the receivers, after deducting the commissions of the receivers, the expenses and disbursements of the said receivership, including the proper compensation for their attorney, shall be disbursed as follows: Seventy-five per cent. of the thirty dollars (\$30) due W. E. Owens & Son is to be paid to them first out of said fund, and that the balance is to be applied *pro rata* on the ascertained existing indebtedness of W. E. Owen & Sons, Warren G. Strong, Oriskany Falls National Bank, C. W. Clark, Vernon National Bank in proportion to the amounts due them by computation.

Eighth. I return herewith the original petition and schedules, final account, the order of dissolution and appointment of receivers, the order ordering the sale of real estate of said corporation, the orders ordering the payment of the various dividends and the order appointing the undersigned referee, used by me on such hearing, together with this my report.

All of which is respectfully submitted.

WM. K. HARVEY,

Dated, October 16, 1911.

Referee.

Order Settling Accounts and Discharging Receiver.

(Caption and title.)

On reading and filing the receivers' account of their proceedings herein and the exhibits and vouchers accompanying the same, and the order of this court of date of October 7, 1911, referring said account to William K. Harvey, Esq., an attorney-at-law of Utica, Oneida county, N. Y., to hear and examine the proofs, vouchers and documents connected with said account, and to report the same to this court, and the same having been duly examined by the said referee and his report duly presented this day to this court, with the vouchers, evidence and proceedings had and the evidence taken before him, and due proof of the presentation of this report and of the application for the order passing said account having been received and filed on the part of the Attorney-General of the State of New York, and the report of the said referee having been duly examined and considered,

Now, on motion of Louis M. Martin, attorney for the receivers,

Ordered, that the report of the said William K. Harvey, as referee, dated the 16th day of October, 1911, be and the same is in all respects ratified, approved and confirmed; it is further

Ordered, that the account of all the proceedings of the said Warren G. Strong and Alvin W. Strong, as receivers of the Knoxboro Canning Company, be and the same hereby is allowed and in all things confirmed and decreed to be final and conclusive upon all the creditors of the said corporation, and upon all persons who have or had claims against or upon any open or subsisting engagement, and upon all the stockholders of the said corporation; it is further

Ordered, that the said receivers be, and they hereby are, directed to pay to William K. Harvey the sum of twenty dollars (\$20) for his services as such referee, and to pay further for advertising and the publication of all notices connected with this account, and that the said receivers retain in their hands the sum of one thousand dollars (\$1,000) for their commissions, expenses and disbursements connected with the said receivership, out of which is to be paid to the attorney for the receivers a proper compensation for his services.

Said receivers are hereby ordered and directed to pay the balance of the said money in their hands as follows: First to W. E. Owens & Sons 75 per cent. on the thirty dollars (\$30) existing indebtedness; and the balance is to be applied *pro rata* on the ascertained existing indebtedness of Warren G. Strong, the Oriskany Falls National Bank, C. W. Clark and the Vernon National Bank and W. E. Owens & Sons in proportion to the amounts due them by computation on the date of such payment, and that the aforesaid

amounts be paid to the said aforementioned parties upon their giving said receivers a proper voucher thereof; it is further

Ordered and directed, that if any of the aforesaid parties refuse to give the vouchers herein provided for, or if the whereabouts of said parties cannot be learned, that the said receivers be and they hereby are directed to deposit the said amount so due him with the treasurer of the county of Oneida, subject to the further order of the court, and that they take the voucher of the said county treasurer therefor; it is further

Ordered, that the said receivers file and further report to the clerk of the county of Oneida, showing their compliance with the terms and provisions of this order, and that upon the filing of the said report and the vouchers herein directed to be retained, the said Warren G. Strong and Alvin W. Strong, as temporary receivers, and as permanent receivers of the Knoxboro Canning Company shall henceforth be and they hereby are finally, duly and forever discharged as receivers, and that the bond given by the said receivers on their appointment as temporary and permanent receivers, and each of them, shall henceforth be vacated, canceled and discharged, and that all the sureties upon said bond, and each of them and their heirs, executors and administrators shall from henceforth be and they hereby are fully and finally released, discharged and acquitted of any and all liability arising from or by reason of said bonds or any matter or things in connection therewith, or arising therefrom.

STATE OF NEW YORK, }
ONEIDA COUNTY CLERK'S OFFICE, } ss.:

I, Charles A. G. Scothorn, clerk of said county, and of the Supreme and County Courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy or order, etc., and the indorsements thereupon with the original thereof, on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said county and courts, at the city of Utica, this 21st day of October, 1911.

CHARLES A. H. SCOTHORN,
Clerk.

C. C. WENZEL,
Deputy Clerk.

Final Report of Receiver.

(Title.)

To the Supreme Court of the State of New York:

The report of Warren G. Strong and Alvin W. Strong as receivers of the Knoxboro Canning Company, with reference to the final order of this court, made on the 21st day of October, 1911, is as follows:

Your receivers report that pursuant to the terms of said order, they have paid to Hon. William K. Harvey the sum of twenty dollars (\$20) for his services as referee herein and also the sum of six dollars and ninety cents (\$6.90) for advertising and the publication of all notices connected with the filing of said account.

That they have retained the sum of one thousand dollars (\$1,000) in their hands for their commissions, expenses and disbursements connected with said receivership, out of which they have fully paid the attorney for the receivers for his services. That out of the balance remaining in their hands, they have paid to W. E. Owens & Son the sum of twenty-two dollars and fifty cents (\$22.50), being 75 per cent. of the thirty dollars (\$30) due and owing to them for existing indebtedness unpaid, and that the balance of said indebtedness has been applied to the existing indebtedness of said corporation, as ascertained heretofore in proportion to the balance due, and said payments are as follows:

Warren G. Strong.....	\$365 92
Oriskany Falls National Bank.....	139 43
C. W. Clark.....	79 63
Vernon National Bank.....	394 73
W. E. Owens & Son.....	1 13

That attached hereto are the vouchers for such payments received from the said creditors.

And your receivers further report that the payments above made exhausted the resources received by them as such receivers and are the final payments made under the order of this court and that the vouchers for the payment so made are attached to and made a part of this report.

Dated, *October 27, 1911.*

WARREN G. STRONG,
ALVIN W. STRONG,
Receivers.

(Add verification.)

Petition and Schedules.

IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF THE COMBUSTION UTILITIES COMPANY.

To the Supreme Court of the State of New York, County of New York:

The petition of Paul R. Jones, Frank W. Frueauff, Warren W. Foster, Louis F. Musil, Charles T. Brown and Carl B. Gilbert respectfully shows to this court:

1. That your petitioners are a majority of the directors having the management of the concerns of the Combustion Utilities Company, a corporation organized and existing under and by virtue of the laws of the State of New York, to wit, under the Business Corporations Law.

2. That your petitioners have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it. That the same are not sufficient to longer carry on the business of the corporation or carry out its charter purposes.

That the stock of the corporation is equally divided into not more than two independent ownerships or interests; and that one-half of the stock of the corporation is owned by persons favoring the course of part of the directors and one-half thereof is owned by persons favoring the course of the other directors.

That your petitioners deem it beneficial to the interests of the stockholders that the corporation should be dissolved, and are induced to desire its dissolution for the reasons stated in the preceding paragraphs, and for the further reasons stated forthwith, namely, that the corporation is now doing and has done no business nor has it been able to do business for over one year past, and has been for a much longer period insolvent and is now so hopelessly insolvent (as more particularly appears from schedule "A" hereto annexed and made a part of the petition) that it is neither practical nor possible to resume business; that the corporation has no moneys with which to pay State or city taxes as the same may become due; that the stock of the corporation is equally divided into not more than two independent ownerships or interests; that all efforts on the part of one of said interests to induce the other to co-operate in the furtherance of the charter purposes of the corporation have failed, and instead of co-operating the said other interest (though often requested) for more than a year last past has remained away from the stockholders' meetings and thereby has successfully prevented special and annual meetings of stock-

holders, and still continues in like manner to prevent the holding of the same; that, though regularly called from time to time, no annual meeting of stockholders has ever been held because of the non-attendance of a majority of the stockholders at any such meeting; that by reason of the inaction of the said other interest, all endeavors to continue the business of the corporation have been thwarted, and the credit of the corporation has been so far affected as to render impractical if not impossible the resumption of business; that the directors representing the owners of one-half of the stock have neglected and refused to attend meeting, though duly and regularly notified; that the corporation was organized for the development and installation of certain patents and processes, and the installation thereof has not been successful, and the corporation has been subjected to many claims for damages, and suits have been threatened thereon as hereinafter appears from schedule "A."

3. That the principal office of the said corporation is located at 60 Wall street, borough of Manhattan, New York city.

4. That your petitioners have hereunto annexed and made a part of this petition a schedule marked "A," containing a statement of the matters required by chapter 23, article 9, section 174, of the Consolidated Laws, as far as your petitioners know or have the means of knowing the same.

WHEREFORE, your petitioners pray for the final order of this court dissolving the corporation and appointing a receiver of its property and effects, and for such other and further relief as may seem just and proper.

Dated,

(Add verification.)

Petitioners.

Schedule "A."

1. A full and true account of all the creditors of the corporation, Combustion Utilities Company, and of all unsatisfied engagements entered into by, and subsisting against the corporation, are as follows: (Recitals.)

2. A statement of the name and place of residence of each creditor, and of each person with whom such engagement was made, and to whom it is to be performed, is as follows: (Recitals.)

3. A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand or other engagement, is as follows: (Recitals.)

4. A statement of the true cause and consideration of the indebtedness to each creditor is as follows: (Recitals.)

5. A full, just and true inventory of all the property of the said Combustion Utilities Company, and of all the books, vouchers and securities relating thereto, is as follows: (Recitals.)

6. A statement of each incumbrance upon the property of the said corporation by judgment, mortgage, pledge or otherwise: (Recitals.)

7. A full, true and just account of the capital stock of the corporation, specifying the name of each stockholder, his residence, the number of shares belonging to him, the amount paid in on his shares and amount still due thereupon: (Recitals.)

Petition.

(Matter of Rateau Sales Co., 202 N. Y. 420.)

SUPREME COURT—NEW YORK COUNTY.

IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF RATEAU SALES COMPANY.

To the Supreme Court of the State of New York:

The petition of Leonce Battu, C. H. Smoot and Robert Gregg respectfully shows to this court that they are a majority of the directors having the management of the concerns of the Rateau Sales Company, a corporation

created under the Laws of the State of New York, to wit, the Business Corporations Law;

That your petitioners have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; that the same are not sufficient to longer carry on the business of the corporation or carry out its charter purposes; your petitioners have been requested by the owners of a majority of the stock of the company to bring the proceedings to dissolve this company; that said corporation is doing no business and your petitioners deem it beneficial to the interests of the stockholders that the said corporation should be dissolved.

That the principal office of the said corporation is located at No. 2 Rector street, borough of Manhattan, city of New York.

That your petitioners have annexed to this petition a schedule marked "Schedule A," containing a statement of the matters required by section 2421 of the Code of Civil Procedure, as far as your petitioners know or have the means of knowing the same.

WHEREFORE, your petitioners pray for a final order of this court dissolving the said corporation, and for such other and further relief as may be proper.

Dated, New York city, 31st day of *March*, 1909.

(Signed)

L. BATTU.

ROBT. E. GREGG.

C. H. SMOOT.

(Add schedules and verification.)

Order to Show Cause, Appointing Temporary Receiver, etc.

(Special Term Caption.)

IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF THE BUFFALO EXPOSITION COMPANY.

Upon reading and filing the petition of George F. Brooks and Robert Walter, duly verified on the 30th day of June, 1909, whereby it appears that the said petitioners constitute a majority of the directors of the Buffalo Exposition Company, that the said company is a corporation organized under and existing by virtue of the laws of the State of New York, and that said company is doing business at Buffalo, Erie county, N. Y.; that said company is insolvent, and its property is not sufficient to pay all its just debts for which it is liable and to afford reasonable security to those who deal with it; that said company owns a lease of real estate and certain personal property, consisting of exposition booth, improvements, etc., and is indebted to divers persons in large amounts, the greater part of which is past due, and said company is being pressed for payment and has no available funds with which to pay its debts and carry on its business, and is unable to procure funds therefor; that actions are about to be commenced against the said company by its creditors, for the collection of debts against the said company and a lien has been filed against the property of the said company, and that if the property of the company is levied upon and sold under execution, said property will be exhausted and there will not be enough to satisfy claims of creditors in full and that it will be beneficial to the interests of the creditors and stockholders that the said company be dissolved and its property placed in the custody of the court, and said petition further containing a schedule showing the assets and liabilities of the said corporation, and other matters required by statute to be shown, and also stating reasons why an injunction should be granted restraining the creditors from suing the said corporation, and it also appearing that it will be for the best interests of the stockholders that a

temporary receiver, asked for therein, be appointed to conduct the business of the company in his discretion, subject to the order of the court; and upon reading and filing the proof of service of notice of this application upon the Attorney-General of the State of New York, and said Attorney-General of the State of New York appearing in open court by his representative, Walter F. Hefheins, of the city of Buffalo, N. Y., it is

Ordered, that all persons or creditors interested in said Buffalo Exposition Company, show cause before William G. Kilhoffer, who is hereby appointed referee for that purpose, at his office No. 308 Brisbane Building, in the city of Buffalo, N. Y., on the 1st day of September, 1909, at ten o'clock in the forenoon of that date, why the said corporation should not be dissolved pursuant to the rule and practice of this court; it is further

Ordered, that a copy of this order be published in the *Buffalo Express*, a newspaper published in the city of Buffalo, N. Y., and in the *Buffalo News*, a newspaper published in the city of Buffalo, N. Y., once a week in each of the three weeks immediately preceding the said 1st day of September, 1909; it is further

Ordered, that all creditors interested in the said corporation be and they are hereby enjoined and restrained from commencing any suit against the said corporation, and from further prosecuting suits already commenced; and it is further

Ordered, that Eugene Warner of the city of Buffalo, N. Y., be and he is hereby appointed temporary receiver of the said corporation, pursuant to section 2423 of the Code of Civil Procedure, and that such temporary receiver immediately take possession of the property and effects, real and personal, of every nature, kind and description, of said corporation, and hold and administer the same according to law, and that before the said receiver takes possession of such property or enters upon the discharge of his duties, he execute and file with the clerk of Erie county a bond to the people of the State of New York, in the penal sum of twenty-five thousand dollars (\$25,000), conditioned for the faithful discharge of his duties as such receiver, said bonds to be approved by a justice of this court; it is further

Ordered, that the Columbia National Bank be and the same is hereby designated as the place of deposit, wherein the funds of the said corporation not needed for immediate distribution shall be deposited; it is further

Ordered, that such temporary receiver in the performance of the duties of his trust act in all things subject to the order of this court; it is further

Ordered, that said temporary receiver have permission and he is hereby authorized and empowered to continue and carry on the business of the said company, in the conducting of entertainments, expositions, etc., until the further order of the court, provided, however, that no indebtedness shall be incurred by said temporary receiver for that purpose, except the necessary help and supplies, without the further order and express authority of this court; and it is further

Ordered, that the receiver above named be empowered to borrow the sum of three thousand dollars (\$3,000), in his discretion, such sum so borrowed to be a lien on the funds of the receiver, coming into his possession.

Granted,

Dated,, 1911.

....., Special Deputy Clerk.

Petition for Leave to Bring Suit and Order Thereon.

(Title.)

The petition of Eugene Warner respectfully shows:

That heretofore and on or about the 30th day of June, 1909, he was duly appointed receiver of the above-named corporation. That he qualified as

such, and is now performing the duties of said office. Your petitioner has been informed that a cause of action exists against one Peter McNeil of the city of Buffalo, N. Y., upon certain claims existing in favor of the said corporation against said Peter McNeil arising out of the transaction whereby the said Peter McNeil secured for his benefit 2,264 shares of the capital stock of the said corporation without having duly paid therefor in the name of G. F. Brooks. That no proceedings have been instituted to recover payment for said shares of stock.

WHEREFORE, your petitioner asks for an order permitting the said receiver to commence an action to recover the sum of twenty-two thousand six hundred and forty dollars (\$22,640) on behalf of said corporation against the said Peter McNeil.

Dated,

(Add verification.)

Petitioner.

(Title.)

(Special term caption.)

Upon reading and filing the petition of Eugene Warner verified the 15th day of July, 1909, for leave to commence an action against Peter McNeil upon a cause of action existing in favor of the Buffalo Exposition Company for unpaid stock in the sum of twenty-two thousand six hundred and forty dollars (\$22,640), and upon due notice of said application to the Attorney-General, and Walter C. Hofheins, Deputy Attorney-General, appearing on behalf of the State of New York, and on motion of Eugene L. Falk, attorney for said receiver, it is hereby

Ordered, that leave be and the same is hereby granted to the said Eugene Warner as receiver to commence an action against Peter McNeil to recover the unpaid balance upon two thousand two hundred and sixty-four (2,264) shares of the capital stock of the Buffalo Exposition Company.

Granted,

Dated,

.....

Special Deputy Clerk.

Order Granting Leave to Receiver to Issue Certificates.

(Title.)

(Special term caption.)

An application having been made by Eugene Warner, temporary receiver of the Buffalo Exposition Company in proceedings for the voluntary dissolution of said corporation, for an order authorizing said receiver to borrow the sum of three thousand dollars (\$3,000) and issue his certificate therefor, and upon reading and filing the petition of Eugene Warner, verified the 9th day of July, 1909, and Eugene Warner appearing and stating in open court that in his opinion it would be advisable to borrow said sum of three thousand dollars (\$3,000) and continue the business, which in his opinion could be made to pay; that he had cut down the running expenses of said business and that the attendance had been very good for the last and past week, and that he had advertised to continue the business; and it appearing to the satisfaction of the court that in order to continue said business it is necessary that the receiver be authorized to borrow said sum, and that unless said loan be authorized the assets of said corporation, which consists of the buildings on said property, will be of little or no value, whereas if said business is conducted said building may be of greater value, and will inure to the benefit of the general creditors of the Buffalo Exposition Company, and it further appearing that since the said business has been conducted by said receiver the expenses have been diminished, and that said business has been conducted at a gain, and that unless the receiver is authorized to borrow money said business must be discontinued, in which event the creditors of said Buffalo Exposition Company would receive nothing, and after hearing Eugene L. Falk, counsel for the receiver, in support of said application, and Walter F. Hofheins, representing the Attorney-General of the State of New York, consenting thereto,

Now, on motion of Eugene L. Falk, attorney for said receiver, it is hereby *Ordered and decreed*, that the said Eugene Warner be and he hereby is authorized to issue and deliver his certificate as receiver to the person, firm or corporation for the sum of three thousand dollars (\$3,000) for moneys to be advanced by said person, firm or corporation to the said receiver. Said certificate shall be a first lien upon all and singular the property of the said Buffalo Exposition Company.

The certificate under this order shall be countersigned by the clerk of the court, and shall be substantially in the following form:

“This is to certify that Eugene Warner, receiver of the Buffalo Exposition Company, as such receiver and not individually is indebted unto or the bearer hereof in the sum of three thousand dollars (\$3,000) payable on or before the 1st day of September, 1909, with interest from the date hereof at the rate of 6 per cent. per annum, out of the assets of the Buffalo Exposition Company.”

The said certificate is by the terms of said order a first lien on all and singular the property of the Buffalo Exposition Company, owned by it at the date of said order appointing Eugene Warner receiver, or thereafter acquired by said receiver, and upon the income thereof, and is prior in right to all other claims other than the actual expenses necessary in and incidental to the said receivership.

Granted,
Dated, *Special Deputy Clerk.*

Petition for Leave to Continue Business and Order Thereon.

IN THE MATTER OF THE BUFFALO GUM
COMPANY.

To the Supreme Court:

The petition of Eugene L. Falk respectfully shows to this court:

1. That he was appointed temporary receiver in the above-entitled proceeding by an order of this court dated on the 25th day of October, 1910.
2. That he immediately entered upon his duties as such receiver and qualified as directed in said order and has ever since and still is acting as such temporary receiver.
3. Your petitioner further shows that the business of said corporation consists of the manufacturing and sale of chewing gum. That there are at the present time a number of unfulfilled orders and contracts and that there is now on hand perishable property which should be made up into the finished product and sold. That said orders which are now unfulfilled and which are daily coming in can be filled at a profit according to your petitioner's belief. That the good will of said business demands that the business of said corporation should be continued and its orders fulfilled so that the same may be sold for the largest possible amount and unless such business is continued and the orders fulfilled the good will of the business will deteriorate.
4. Your petitioner further shows that by reason of the foregoing facts he verily believes that it will be for the best interest of creditors to permit him to carry on said business and fulfill the orders now on hand.

WHEREFORE, your petitioner asks for an order authorizing him to continue such business.

Dated,
(Add verification.) *Petitioner.*

(Title.) (Special term caption.)

On reading and filing the petition of Eugene L. Falk, verified the 28th day of October, 1910, asking for an order permitting him to continue business of

the above-named corporation and it appearing to the satisfaction of the court that it will be for the best interest of creditors that said temporary receiver be given an order permitting him to carry on said business, and upon reading and filing due admission of service of the notice of this application and the Attorney-General of the State of New York appearing in open court by his representative, Walter F. Hofheins, of the city of Buffalo, N. Y., and not objecting thereto, and after hearing Edward C. Schlenker, of counsel for the petitioner and due deliberation having been had thereon,

Now, on motion of Edward C. Schlenker, Esq., attorney for petitioner, it is

Ordered, that said temporary receiver have permission and he is hereby authorized and empowered to continue and carry on the business of said company of manufacturing and selling chewing gum and all other matters incidental to said business until the further order of this court, provided, however, that no indebtedness shall be incurred by said temporary receiver for that purpose except the necessary help and supplies without the further order and express authority of this court.

Order Discharging Temporary Receiver.

(Title.)

(Special term caption.)

A motion having been made in the above-entitled action by the temporary receiver herein for an order granting him his fees and commissions for himself and his attorney herein in the above-entitled matter, discharging and canceling his bond heretofore given herein, discharging himself as such temporary receiver, and authorizing him to pay over to Frank L. Barnett, the receiver of the above-entitled corporation now adjudicated a bankrupt in the United States District Court for the Western District of New York, said Frank L. Barnett, having been appointed receiver of said bankrupt by the United States District Court and having duly qualified; and it appearing to the satisfaction of this court that said temporary receiver herein should be allowed the sum of seventy-five dollars (\$75) for and on account of his services and commissions and those of his attorney in addition to the sum of two dollars and thirty cents (\$2.30), the amount paid out by him for filing the papers herein with the county clerk,

Now, on reading and filing the petition of Eugene L. Falk, verified the 29th day of November, 1910, and the exhibit thereto annexed and the affidavit of Edward C. Schlenker, the attorney for the temporary receiver herein, verified the 29th day of November, 1910, and after hearing Edward C. Schlenker, Esq., attorney for the temporary receiver herein, and Frank L. Barnett, appearing in person, and Walter F. Hofheins, Esq., representing the Attorney-General of the State of New York, not objecting thereto,

Now, on motion of Edward C. Schlenker, Esq., attorney for the temporary receiver, it is

Ordered, that Eugene L. Falk retain the sum of seventy-five dollars (\$75) for and as his fees and commissions and the allowance of his attorney as temporary receiver in the above-entitled matter, and the further use of two dollars and thirty cents (\$2.30), the amount paid out and which will necessarily be expended in the filing of the required papers and orders in the county clerk's office in the above-entitled matter; it is further

Ordered, that after deducting the said sum of seventy-seven dollars and thirty cents (\$77.30) he is hereby authorized and empowered to pay over to Frank L. Barnett as receiver of the Buffalo Gum Company, an alleged bankrupt, which proceedings are now pending in the District Court of the United States for the Western District of New York, the balance remaining in his hands, viz.: Two hundred and sixty dollars and thirty-two cents (\$260.32); it is further

Ordered, that said Eugene L. Falk, upon paying over to the said Frank L.

Barnett the sum of two hundred and sixty dollars and thirty-two cents (\$260.32), the balance remaining in his hands as such temporary receiver, be and he hereby is discharged as such receiver; it is further

Ordered, that the bond given by him in the above-entitled matter which was executed by the United States Fidelity & Guaranty Company for the sum of twenty thousand dollars (\$20,000), which said sum was recorded in the office of the clerk of the county of Erie on the 29th day of October, 1910, be and the same hereby is canceled and discharged, and the said bonding company relieved from further liability upon said undertaking.

Granted,

Dated,

.....
Justice Supreme Court.

Order Discharging Temporary Receiver and Canceling Bond.

(Title.)

(Special term caption.)

An application having been made for an order reducing the amount of the bond given by the temporary receivers in the above-entitled action, and due notice of this application having been given to all the parties interested in said matter, and it having been made to appear to the satisfaction of the court that a permanent receiver has heretofore been appointed, and that said receiver duly qualified, upon reading and filing the petition of Joseph A. Stone, verified the 12th day of July, 1910, and the notice of motion together with the admission of service thereof, and after hearing Eugene L. Falk, Esq., counsel for Joseph A. Stone and Eugene Warner, temporary receivers, and no one appearing in opposition thereto, it is

Ordered, that Joseph A. Stone and Eugene Warner, temporary receivers in the above-entitled matter, pay over to Eugene L. Dominick all moneys which they have in their hands as such temporary receivers in the above-entitled matter amounting to the sum of one thousand four hundred and fifty-six dollars and eighty cents (\$1,456.80); and it is further

Ordered, that upon the turning over of said moneys said temporary receivers are hereby discharged from all liability and accountability, and that the bonding company issuing the indemnity bond for said receivers be and the same is hereby discharged and relieved from all liability of whatsoever kind on account of said bond or otherwise.

Granted, *July 8, 1910.*

PERRY E. WURST,
Special Deputy Clerk.

Petition for Instructions as to Bringing Suit and Order Thereon.

IN THE MATTER OF THE INLAND LUMBER
COMPANY,

First. The petition of George W. Foster respectfully shows to the court:

That he is the receiver of the Inland Lumber Company, Geneva, Ontario county, in the State of New York, having been duly appointed by an order of this court made in the above-entitled proceedings at a Special Term thereof held at the courthouse in the city of Rochester on the 10th day of January, 1910, and which said order was duly entered in the Ontario county clerk's office on the 11th day of January, 1910.

Second. That your petitioner has duly given bond provided for in and by the terms of said order so appointing him as such receiver as aforesaid, which said bond was duly approved as to form, manner of execution, and sufficiency, and duly filed in the Ontario county clerk's office on the 11th day of January, 1910.

That Frances F. Whitehill of Brookville, Pa., William J. Hood of Rochester, N. Y., and William Pugh of Rochester, N. Y., are each indebted to the Inland Lumber Company, the said Frances F. Whitehill in the sum of four thousand five hundred dollars (\$4,500), the said William J. Hood in the sum of four hundred and ninety dollars (\$490) and the said William Pugh in the sum of four hundred and ninety dollars (\$490), the same being for unpaid subscriptions to the capital stock of the said Inland Lumber Company; that said debtors refused to pay the same; that in the petitioners' judgment said claims are honest and collection should be enforced.

WHEREFORE, your petitioners pray for the advice and direction of this honorable court in the matters hereinbefore set forth and that he may be authorized to bring suit against the said Frances F. Whitehill, William J. Hood and William Pugh or any one of them for the amount due from each one and to proceed with the same in such manner and in such court as counsel may advise.

That no further or former application has been made for this or any similar order or relief.

Dated,

Receiver.

....., *Attorney for Receiver.*
(Add verification.)

(Title.)

(Special term caption.)

Upon reading the petition of the receiver of the Inland Lumber Company, with proof of due service on Hon. Edward R. O'Malley; the Attorney-General of the copy of the petition and proposed order and notice of motion for this time and place, and on motion of W. S. O'Brien, attorney for the receiver, it is

Ordered, that the said George W. Foster, receiver, be and he hereby is authorized and empowered and directed to take such action against Frances F. Whitehill of Brookville, Pa., William J. Hood of Rochester, N. Y., and William Pugh of Rochester, N. Y., or any one of them for securing the payment of the amount due from each to the said Inland Lumber Company as may seem best to counsel.

Petition for Accounting by Temporary Receiver.

(Title.)

To the Supreme Court of the State of New York:

I, George W. Foster, of the city of Geneva, county of Ontario and State of New York, do hereby respectfully render the following account of all my proceedings as temporary and permanent receiver of the above-named corporation.

1. That I was duly appointed temporary receiver of the above-named corporation by an order of this court made at a Special Term of the Supreme Court held in the city of Rochester, N. Y., on the 10th day of January, 1910, and which was duly entered in the Ontario county clerk's office on the said 10th day of December, 1909.

2. That in accordance with the provisions of said order I duly filed my bond in said Ontario county clerk's office, the same being duly approved by this court. In accordance with the terms of said order I published once a week for four successive weeks immediately preceding the 7th day of March, 1910, a copy of said order in the *Geneva Daily Times*, a newspaper published in the county in which said order was entered, as appears by the affidavit of publication hereto annexed and marked "A."

3. That in and by an order made at a Special Term of this court held on the 7th day of March, 1910, at the courthouse in the city of Rochester, N. Y., the said Inland Lumber Company was dissolved and I was continued as per-

manent receiver of all the property of said corporation, and in and by the terms of said order I was authorized, empowered and directed to sell at public sale the property and assets of said company and to collect the debts due to said company.

4. That in and by an order made at a Special Term of this court held on the 15th day of January, 1910, at the courthouse in the city of Rochester, N. Y., I was authorized, empowered and directed to take such action against Frances R. Whitehill of Brookville, Pa., William J. Hood of Rochester, N. Y., and William Pugh of Rochester, N. Y., or any one of them for securing the payment of the amount due from each to the said Inland Lumber Company as should seem best to counsel.

That on the 15th day of January, 1910, the receiver made application to this court for a warrant of attachment against the property of Frances F. Whitehill as security for the satisfaction of such judgment as said receiver might obtain against the said Frances F. Whitehill.

That on the 15th day of January, 1910, this court issued a warrant of attachment against the said Frances F. Whitehill, under which the sheriff of Ontario county attached property belonging to the said Frances F. Whitehill to the value of two hundred and thirty-one dollars and sixty-nine cents (\$231.69), of which two hundred and twenty-one dollars (\$221) was turned over to the receiver of the Inland Lumber Company by said sheriff, to apply on the judgment secured by the receiver against the said Frances F. Whitehill on the 6th day of May, 1910, which judgment amounted to the sum of four thousand five hundred and eighty-nine dollars and ten cents (\$4,589.10).

That on or about the 20th day of May, 1910, the receiver entered into an agreement with William Pugh. That on or about the 20th day of May, 1910, the receiver compromised the claim held against William Pugh for five hundred dollars (\$500), amount unpaid on his subscription to the capital stock of the Inland Lumber Company, and accepted in payment thereof his notes for two hundred and fifty dollars (\$250) and the assignment of twenty-five (25) shares of the preferred stock of the Inland Lumber Company held by him.

That on or about the 1st day of June, 1910, the receiver compromised the claim against William J. Hood by accepting his notes for one hundred dollars (\$100).

That in and by an order made at a Special Term of this court held on the 24th day of October, 1910, the receiver sold at public auction on the 5th day of November, 1910, said judgment of four thousand five hundred and eighty-nine dollars and ten cents (\$4,589.10) held by him as receiver against Frances F. Whitehill and at the same time offered and sold seven promissory notes made by William Pugh, dated May 20, 1910, each in the sum of twenty-five dollars (\$25), three promissory notes made by William J. Hood dated June 1, 1910, two in the sum of twenty dollars (\$20) each and one in the sum of ten dollars (\$10).

That said notice of receiver's sale was duly advertised and posted in three public, conspicuous places in the city of Geneva, as is more fully shown by the affidavit of publication and posting hereto annexed and marked exhibit "E."

That at said sale the receiver realized from the sale of said judgment the sum of seventeen dollars (\$17); from the seven promissory notes made by William Pugh the sum of one hundred and six dollars (\$106), and from the three promissory notes held by William J. Hood the sum of thirty-seven dollars (\$37), making a total of one hundred and sixty dollars (\$160).

That after my appointment as such receiver of the above-named corporation I gave notice of such appointment as follows, viz.: (Recitals) By printing such notice once a week for three successive weeks in a newspaper within the county in which the corporation has its principal office of business, to wit:

The *Geneva Daily Times*, a newspaper published in the city of Geneva, in said county of Ontario, as appears by the affidavit of publication hereto annexed and marked "B."

6. Schedule "1" hereto annexed contains a full, accurate and true account all moneys and property received or collected by me, all of which I am chargeable.

7. Schedule "2" hereto annexed contains a full, accurate and true account of all disbursements made by me, showing the balance of money in my hands.

8. That a notice for the presentation of my account as receiver of the above-named corporation, a copy of which is as follows, viz.:

Notice to the creditors and all persons interested in the Inland Lumber Company, of Geneva, Ontario county and State of New York.

TAKE NOTICE, that a full and accurate account of all the proceedings of George W. Foster, as receiver of the above-named corporation, on oath, will be presented to the Supreme Court of the State of New York, at a Special Term thereof to be held at the city of Rochester, N. Y., on the 14th day of November, 1910, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the same be allowed and decreed to be final and conclusive upon all the creditors of the said corporation, and upon all persons who may have claims against it upon any open or subsisting engagement, and upon all the stockholders of such corporation, and that said receiver be authorized to pay a final dividend, and upon proof of the payment thereof that he be discharged and his bond vacated, and for such other or further order as to the court may seem proper.

Dated,

Receiver of the Inland Lumber Co.

was duly published as prescribed by law by printing such notice at least once a week for three successive weeks in the *Geneva Daily Times*, being a newspaper published in the county in which the principal office of said corporation is located, with the affidavit of publication of said last-mentioned notice which is hereto annexed and marked "C." That the notice of the presentation of my account as receiver of the above-named corporation was duly served upon Hon. Edward R. O'Malley, Attorney-General, Albany, N. Y., also upon The Title, Guaranty & Surety Company of Scranton, Pa., and the affidavits of service of said notices are hereto annexed and marked "D."

9. That no money, property or effects, other than stated in said schedules, have come into my hands or possession and that no appearances by any attorneys have been received by me or served upon me.

10. That no accounts or demands against said corporation or any open or subsisting contracts with said corporation have been delivered or presented to me except as hereinafter stated. That the only creditors of said corporation are the stockholders thereof.

11. Schedule "3" hereto annexed contains the name and residence of each creditor other than stockholders and the amount found due him according to his proved claims.

12. Schedule "4" hereto annexed contains the name and residence of each stockholder and the amount and kind of stock held by him in said company.

13. I know of no creditors interested in the assets of said corporation other than the said creditors mentioned in said schedule "3" and the stockholders of said company as set forth in schedule "4," all of which is respectfully submitted.

Dated,

(Add verification.)

Receiver.

SCHEDULE "1."

A statement of all receipts during the time of my receivership: (Insert statement of receipts with date and name of party.)

SCHEDULE "2."

DISBURSEMENTS.

(Insert amounts paid with date and description of disbursement.)

SCHEDULE "3."

The following is a statement of all creditors, their residence, and the amount due them: (Insert statement.)

SCHEDULE "4."

The following is a full, just and true account of the capital stock of the Inland Lumber Company, specifying the name of each stockholder, his residence and the number of shares belonging to him. (Insert statement.)

Agreement with Counsel.

IN THE MATTER OF THE ROCHESTER NON-
RUST TINWARE COMPANY.

Memorandum of agreement, made this 30th day of June, 1910, by and between Arthur Warren, as permanent receiver of the Rochester Non-Rust Tinware Company, a domestic corporation located at Rochester, N. Y., of the first part, and Christopher C. Werner and George H. Harris, composing the firm of Werner & Harris, practicing attorneys in the city of Rochester, N. Y., of the second part, witnesseth:

WHEREAS, the party of the first part hereto was on the 25th day of June, 1910, appointed permanent receiver of the said corporation in a voluntary proceeding for dissolution thereof, and he having duly qualified is now acting as such permanent receiver.

Now, therefore, it is agreed that said party of the first part does hereby employ the parties of the second part as his counsel as such receiver of said corporation, and he hereby agrees to pay the said parties of the second part as and for their compensation as attorneys for such receiver the value of such services not to exceed five per cent. (5%) of all sums of money that shall come into his hands as such receiver. This agreement is made subject to the approval of the Supreme Court and shall expire in eighteen months from the date hereof unless sooner terminated.

Said parties of the second part shall render all necessary legal services to the said receiver in said dissolution proceedings, and the payment of such services shall be made upon the final accounting of the said receiver and upon the approval of the said Supreme Court.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

ARTHUR WARREN,	[L. s.]
<i>As Receiver of Rochester Non-Rust Tinware Co.</i>	
CHRISTOPHER C. WERNER,	[L. s.]
GEORGE H. HARRIS.	[L. s.]

Order Approving Agreement.

(Title.)

(Special term caption.)

Upon reading and filing the proposed agreement herein between Arthur Warren as receiver of the Rochester Non-Rust Tinware Company, a corporation, and Christopher C. Werner and George H. Harris, composing the firm

of Werner & Harris, counsellors-at-law, of Rochester, N. Y., dated, June 30, 1910, the order appointing said Arthur Warren receiver granted on the 25th day of June, 1910, and the papers upon which said order was granted, all on file in the Monroe county clerk's office, and on motion of Werner & Harris, attorneys for said receiver, it is

Ordered, that said agreement between Arthur Warren, as such receiver, and said Werner & Harris, his counsel, be and the same is hereby approved.

All payments on account of such agreement shall only be made at the final accounting herein and upon the order of approval of this court.

Order Discharging Receiver and Directing Dissolution.

(Special term caption.)

IN THE MATTER OF THE APPLICATION OF A
MAJORITY OF THE DIRECTORS OF THE
SENECA BREWING CO. FOR A VOLUN-
TARY DISSOLUTION OF SAID COMPANY.

Upon reading and filing the receiver's account of proceedings herein and the exhibits and vouchers accompanying the same, and the order of this court referring said account to P. N. Nicholas, Esq., as referee, made at a Special Term of this court held at the courthouse in the city of Rochester, N. Y., on the 30th day of August, 1909, and after reading and filing the report of said referee dated the 4th day of November, 1909, and the schedules, exhibits and vouchers accompanying the same, and upon proof of the due service of a copy of said report and papers accompanying the same with the notice of motion for the granting of this order for this time and place, upon the Attorney-General of the State of New York, and upon all the papers and proceedings herein, and no one appearing to oppose this motion, it is

Ordered, that the report of P. N. Nicholas, Esq., dated the 4th day of November, 1909, the referee duly appointed herein by an order made at a Special Term of the Supreme Court held at the courthouse in the city of Rochester, N. Y., on the 30th day of August, 1909, be and the same hereby is in all respects ratified, approved and confirmed; it is further

Ordered, that the account of all the proceedings of George F. Licht, as temporary and permanent receiver of the Seneca Brewing Company aforesaid, be and the same hereby are in all things allowed and decreed to be final and conclusive upon all the creditors of said corporation, and upon all persons who have or had claims against it upon any open or subsisting engagements and upon all the stockholders of said corporation, and upon all persons interested in the same; it is further

Ordered, that said receiver be and he hereby is authorized, directed and empowered to pay a first and final dividend of .085 per cent. to the creditors of said corporation and that the said dividend be paid to the persons and in the amounts set forth in the schedule hereto attached and marked "Exhibit A" and forming a part of this order; it is further

Ordered, that said dividend so declared as aforesaid be paid to the said creditors of the said corporation only upon their giving the said receiver the proper voucher therefor and upon their surrendering to the said receiver any certificates of indebtedness issued by the said corporation aforesaid and which may be held by the creditors of said corporation or any of them; it is further

Ordered, that if any creditor shall not accept said dividend, or shall refuse to give the voucher herein provided for, or refuse to surrender the certificate so held by him, or the whereabouts of said creditor cannot be learned, or upon the failure of any of the creditors to comply with the terms and provisions of this order, that said receiver be and he hereby is directed to

deposit the dividend due such creditor with the county treasurer of the county of Seneca, subject to the further order of this court, and that he take the vouchers of such county treasurer therefor; it is further

Ordered, that said receiver file a further report with the clerk of the county of Seneca, showing his compliance with the terms and provisions of this order, and that upon the filing of such report and the vouchers herein directed to be obtained, the said George F. Licht, as the temporary receiver and as the permanent receiver of the Seneca Brewing Company, shall from thenceforth be and he hereby is finally duly and forever discharged as receiver, and that the bond given by said receiver upon his appointment as temporary receiver and the bond given upon his appointment as permanent receiver, and each of them, shall from thenceforth be vacated, cancelled and discharged, and the surety upon said bonds, its successors and assigns, shall from thenceforth, and they hereby are fully and finally released, discharged and acquitted of any and all further liability arising from or by reason of said bonds, or any matter or any thing in connection therewith or arising therefrom.

CORPORATIONS, ELECTION OF OFFICERS, REVIEW OF, BY SUPREME COURT.

GENERAL CORPORATION LAW, §

§ 32. Powers of supreme court respecting elections.

The Supreme Court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way, hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require. (From chap. 563, L. 1890, as amended by chap. 687, L. 1892 [Gen. Corp. Law], former § 27.)

The section in question (now § 32) is simply a re-enactment of the provisions of the Revised Statutes, and the relief intended by the section was to establish an election already had, or to set aside that election and order a new one, and the proceeding authorized is summary and not by mandamus. *People ex rel. Putzel v. Simonson*, 61 Hun, 338.

Under the provisions of the Revised Statutes (1 R. S. 603, § 5) authorizing any person who "may be aggrieved by or may complain of any election" of directors of a corporation to make application to the Supreme Court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain may institute the proceedings.

Where, therefore, an application was made under said provision for a new election by one who was not a stockholder at the time of the election complained of, but who subsequently received a certificate of stock from one who took part therein; *held*, that the petitioner did not occupy a position authorizing the interposition of the court in his behalf; that even if it be true, as to which *quære*, that an illegal election must be complained of and set aside in order to enable the court to compel an election, when the officers of the corporation omit to call a meeting of stockholders to elect a new board of directors, the complaint may only be entertained when made by some aggrieved party who is not himself the author of the wrong complained of. *Matter of App'n of Syr., C. & N. Y. R. R. Co.*, 91 N. Y. 1.

This proceeding empowers the Supreme Court summarily to inquire into and determine the validity of the elections of corporations, and any proceeding, act, or matter touching the same. While the court has ample power under this section to determine any question relating to the election, even such as is merely incidental thereto when necessarily involved in the controversy, the proceeding is not an action, and is inappropriate for determining equitable claims or questions not necessarily involved in

deciding the primary question. *Matter of Utica Fire Alarm Telegraph Co.*, 115 App. Div. 821 (826), citing *Farmer v. Farmer & Son Type Founding Co.*, 83 App. Div. 218 (225, 226); *Matter of Argus Co.*, 138 N. Y. 557 (573).

A stockholder is not entitled to intervene in a proceeding to annul an election of directors where she merely alleges that she is a stockholder at the time of the motion, and does not show that she was a stockholder at the date of the election, or that the former holder of her stock did not vote for the directors whose election is sought to be set aside. The statute permitting the annulment of an election of directors is intended only for the benefit of a person aggrieved by or complaining of an election, or of a proceeding, act, or matter relating thereto. *Matter of Scheel*, 134 App. Div. 442.

Under the provisions of the General Corporation Law (§ 27, chap. 687, Laws of 1892), making it the duty of the Supreme Court, upon application of "any person or corporation" aggrieved by or complaining of a corporate election, to summarily inquire into the matter, the fact that another party is joined, without authority, as petitioner with a stockholder does not affect the right of the latter to have his petition heard. *Matter of Petition of Argus Co.*, 138 N. Y. 557.

Section 27 of the General Corporation Law, providing for the judicial review of elections of directors of corporations, is not limited in its application to stock corporations, but applies to all kinds of corporations; and notice of the application for such review to the corporation and to the directors claiming to have been elected is a sufficient compliance with the requirement of notice to the adverse party or to those to be affected thereby; and notice to the policy-holders of an insurance corporation is not required; and under that section the court has power, upon the application of policy-holders, to annul an election without regard to the remedy by application to the Attorney-General under section 1948 of the Code of Civil Procedure.

Where the question is as to the legal right to hold any election at all, and not who received a majority of the legal votes cast, it is not required of the applicants to show that a new election would result differently. *Matter of Empire State Supreme Lodge*, 53 Misc. 344.

Section 27 of the General Corporation Law, giving the Supreme Court power to review corporate elections, applies to corporations organized under the Insurance Law.

Aggrieved policy-holders seeking to set aside an election by a proceeding under said section are not required to give notice to all policy-holders of the company. Notice to the corporation itself and the directors, the legality of whose election is challenged, is sufficient.

Policy-holders are entitled to contest the validity of such election in a

proceeding under this section, and action by the Attorney-General under section 1948 of the Code of Civil Procedure is not necessary.

When the election attacked is wholly illegal and without authority the policy-holders seeking to set it aside need not show that a different result will be had in the event of a legal election.

The court, in declaring an election of directors wholly void, will not continue the directors so elected in office until their successors are legally chosen. *Matter of Empire State Supreme Lodge*, 118 App. Div. 616.

Where an application is made under 1 Revised Statutes, 603, section 5, to settle contests arising out of a disputed election, the court may go behind the entries in the transfer-book of the company and determine whether a transfer appearing thereon was a sale or only a pledge of the shares, and whether the pledgor or pledgee was entitled to vote thereon. *Strong v. Smith*, 15 Hun, 222.

Where an election of railroad directors has been procured by temporarily enjoining a reorganization committee, holding 60 per cent. of the stock, from voting, and this injunction is subsequently set aside upon the merits, the result of the election represents only the wishes of a minority of the stockholders and the election must be set aside. *Matter of Townsend*, 24 Misc. 80.

In a proceeding to test the validity of an election of officers in a fraternal benefit association, brought under section 32 of the General Corporation Law, the court has no power to determine the validity of the amendments to the constitution.

Where officers were unanimously elected by the only persons entitled to vote, the election will not be set aside because ballots were cast by persons not entitled to vote. *Matter of Supreme Council, Catholic R. & B. Assoc.*, 142 App. Div. 307.

The strict rules which govern the reception of evidence in civil actions are not applicable to such a proceeding. *Matter of Petition of Argus Co.*, 138 N. Y. 557.

It seems that under the Stock Corporation Law, section 20, an election of directors is not illegal because only a minority of the stock is voted on, as a quorum is made by the stockholders attending or represented. *Ashcroft v. Hammond*, 132 App. Div. 3, 116 Supp. 362.

When the by-laws of a domestic membership corporation do not require notice of the election of officers, an election held at the regular time and place set by the by-laws is not invalid by reason of a failure to give notice. In ordering a new election the court should require members to be notified that a receiver formerly in charge of the affairs of the corporation has been discharged. *Matter of N. Y. Electrical Workers' Union v. Sullivan*, 122 App. Div. 764.

Where a candidate at a corporate election receives a majority of the

legal votes cast the receipt of illegal votes in his favor does not defeat his election. *Matter of Petition of Argus Co.*, 138 N. Y. 557.

The provisions of section 29 of the Stock Corporation Law (chap. 688, Laws of 1892), taken in connection with those of section 20 of the General Corporation Law (chap. 687, Laws of 1892), forbid a stockholder from voting at an election of directors, unless it appears that his stock has been entered in the stock-book of the corporation for ten days immediately preceding the election.

Where a person who has purchased certain stock of a corporation mails to the corporation by registered letter on the 15th day of May his certificate thereof, with directions to have the stock transferred to him upon the books of the corporation, and the letter is not actually received by the corporation until May 21st, nor the transfer made until May 22d, he is not entitled to vote at an election for directors of the corporation held on May 26th.

A transfer of stock which, though absolute upon its face, is designed only to confer upon the transferee the power to vote upon the stock for a period of three years, amounts to a proxy given for a consideration, and is void under section 20 of the General Corporation Law, providing that "no member of a corporation shall sell his vote, or issue a proxy to vote, to any person for any sum of money, or anything of value."

Such a transaction may be attacked as illegal by the stockholders, each of whom is presumed to have an interest in having only legal votes cast. *Matter of Glen Salt Co.*, 17 App. Div. 234; *aff'd*, 153 N. Y. 688.

Holders of policies in a mutual fire insurance company, organized under chapter 239 of the Laws of 1836, as amended by chapter 47 of the Laws of 1848, who have paid a certain definite sum of money in full for insurance therein, in lieu of and in place of a premium note therefor, are as fully and effectively insured as those who have given a premium note for insurance, and are members of the company and entitled to vote at any election of its directors equally with note policy-holders. *Matter of Mutual Fire Ins. Co.*, 164 N. Y. 10, *modif'g* 51 App. Div. 163.

Only stockholders of record or those holding proxies are entitled to vote at an election of directors of a stock corporation under section 20 of the General Corporation Law.

Although a person may have an equitable claim upon stock standing in the name of another, which in a proper action might entitle him to a transfer thereof, such will not be determined in a proceeding under section 27, brought to inquire into the validity of an election.

Hence, a corporation holding the title to certain shares of stock in another corporation and claiming equitable title to certain other shares, partly paid for with its funds, but recorded in the name of certain of its directors, who paid the balance of the purchase price, is not entitled to vote on

the shares recorded in the name of the directors, even though it might be able to enforce its equitable title in a proper action brought for that purpose. The court will not determine the validity of the equitable title in a proceeding to impeach an election brought under this section. *Matter of Utica Fire Alarm Telegraph Co.*, 115 App. Div. 821.

An order made upon notice to the borrower, in a proceeding instituted by the lender under this section, adjudging that the lender, having the legal title to the stock, might lawfully be elected to the office of director of the corporation, is not *res adjudicata* upon the question of the actual ownership of the stock. *Farmer v. Farmer & Son Type Founding Co.*, 83 App. Div. 218.

When, after a failure to vote for directors of a corporation at the regular annual meeting, a special meeting is called for that purpose, the notice required by section 20 of the Stock Corporation Law must be given, together with such other notice as is prescribed by the by-laws.

When the by-laws require in addition to the statutory notice a written notice mailed thirty days before the meeting, a notice of only twelve days is insufficient, and entitles a stockholder who has not appeared or waived his rights to an order vacating the election.

It is no answer to say that the vote on the stock owned by such stockholder would not have changed the result of the election, for he has a right to be present to advocate the election of his candidates.

The petition or notice of motion to vacate such irregular election need not specify the irregularity, not being governed by General Rule of Practice 37.

No waiver of such irregularity by an absent stockholder can be predicated on the fact that his attorneys were present at the meeting. *Matter of Keller*, 116 App. Div. 58.

Section 28 of the Stock Corporation Law, requiring the oath of the inspectors of election at a stockholders' meeting to be filed in the office of the clerk of the county in which the election is held, is directory only, and a failure to comply therewith does not invalidate the election. *Union National Bank v. Scott*, 53 App. Div. 65.

Petition.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE PETITION TO SET
ASIDE THE ELECTION OF DIRECTORS OF
GEORGE RINGLER & COMPANY.

Matter of Ringler, 145 App. Div. 361.

The petition of Anna Hachemeister and J. Edward Jetter, as administrators with the will annexed of Henry Hachemeister, deceased, and J. Edward Jetter as substituted trustee under the will of Henry Hachemeister, deceased, and of Anna Hachemeister individually, respectfully shows to this court:

That your petitioners are stockholders in the corporation of George Ringler

& Co., a corporation duly organized under the laws of the State of New York, and that your petitioners Anna Hachemeister and J. Edward Jetter, as administrators with the will annexed of Henry Hachemeister, deceased, are holders and owners of three thousand (3,000) shares of stock of George Ringler & Co., a corporation whose entire capital stock consists of six thousand (6,000) shares of stock of the par value of one hundred dollars (\$100) a share, and that your petitioner Anna Hachemeister individually is the holder and owner of five (5) shares of stock of the said George Ringler & Co.

That Henry Hachemeister, in his lifetime, was the owner of the aforesaid three thousand shares (3,000) of stock held by your petitioners as such administrators with the will annexed.

That said Henry Hachemeister died on the 5th day of July, 1907, leaving a last will and testament, by which he devised and bequeathed his entire estate to the executors named therein, William G. Ringler and Hon. Leonard A. Giegerich, in trust.

That annexed hereto is a copy of the last will and testament of Henry Hachemeister, deceased.

That the said will of Henry Hachemeister was duly filed in the Surrogates' Court, New York county, and duly admitted to probate by said Surrogates' Court, and letters testamentary duly issued to William G. Ringler, the said Leonard A. Giegerich not having qualified, but having duly renounced as such executor.

That the said William G. Ringler died on the 23d day of January, 1910, and that on January 28, 1910, Anna Hachemeister, one of your petitioners, was duly appointed administratrix with the will annexed of the estate of Henry Hachemeister, deceased, and thereafter on the 3d day of February, 1910, J. Edward Jetter, one of your petitioners, was duly appointed coadministrator with the will annexed of Henry Hachemeister, deceased, and thereafter your petitioners both duly qualified by filing a bond approved of by the Surrogates' Court, New York county, and since have been acting as such.

That thereafter J. Edward Jetter, one of your petitioners, was appointed substituted trustee under the will of Henry Hachemeister, deceased, and duly qualified as such by filing a bond approved of by the Surrogates' Court, New York county, and thereafter the stock owned by Henry Hachemeister, deceased, was exchanged by the said corporation for a certificate for three thousand (3,000) shares of stock in the name of your petitioners, Anna Hachemeister and J. Edward Jetter, as administrators with the will annexed of Henry Hachemeister, deceased.

That in the month of August, 1907, William G. Ringler, by gift, transferred certificate No. 338 of said corporation to Anna Hachemeister individually, your petitioner.

That the principal place of business of said corporation is located at No. 203 East 92d street, borough of Manhattan, city of New York, and your petitioners further state that on the 30th day of October, 1909, there was assumed to be held at the office of said corporation, by virtue of the by-laws, an election of directors, and the following persons were assumed to be elected directors thereat, to wit: William G. Ringler, George F. Trommer, Arthur Strauss, Anna Hachemeister and Isaac Kugelman, and claiming to be directors by virtue of said alleged election said persons organized a board, and assumed to act as such, and that hereto annexed and marked exhibit "A" is a copy of the record of said alleged election taken from the minute-book of said corporation.

That said alleged election and the proceedings, acts and matters touching the same were illegal and invalid for the following reasons:

That at such election there were elected George F. Trommer, Arthur Strauss and Isaac Kugelman, as such directors.

That under the General Corporation Law of the State of New York, and under the certificate of incorporation of said George Ringler & Co., and the by-laws of said corporation, it is necessary that a director, in order to be qualified as such, own at least one share of said stock of said corporation.

That the said Isaac Kugelman, Arthur Strauss and George F. Trommer, at the time of said election, were not the owners of any stock, except that they held merely the record ownership of the same on the books of the said corporation.

That the said stock recorded on the said stock-books as being held by Isaac Kugelman, Arthur Strauss and George F. Trommer, did not belong to them, but belonged to and were the property of William G. Ringler.

That subsequently the said William G. Ringler died on the 23d day of January, 1910.

That said William G. Ringler left a last will and testament, which was duly filed in the Surrogates' Court, New York county, and thereafter the said will was duly admitted to probate by the Surrogates' Court, New York county, and in the said will the said William G. Ringler appointed George F. Trommer and George Ehret, Jr., executors of his last will and testament, and letters testamentary were duly issued to the said George F. Trommer and George Ehret, Jr., on the 16th day of February, 1910.

That subsequently, on the 28th day of February, 1910, there was assumed to be held a monthly meeting of the trustees of George Ringler & Co. and at such meeting it appears that said board of trustees assumed to elect George F. Trommer as president of George Ringler & Co., and George Ehret, as vice-president.

That annexed hereto and marked exhibit "B" is a copy of the record from the minutes of the corporation of said meeting.

That thereafter an adjourned meeting of the board of trustees was assumed to be held on the 4th day of March, 1910, and John T. Wilson was assumed to be elected director in place of Anna Hachemeister, one of your petitioners.

That annexed hereto and marked exhibit "C" is a copy of the record of said meeting.

That said John T. Wilson is not qualified to act as such director, inasmuch as John T. Wilson is not an owner of five (5) shares of stock, except merely that he is the record holder thereof upon the stock-book of the corporation and that in fact the said stock belongs to the estate of William G. Ringler, deceased.

That the said election of said Wilson as director was also illegal, by reason of the fact that he was not such owner of said stock, at the time of said election, except as record holder thereof, as aforesaid.

That the said election was also illegal inasmuch as the said Anna Hachemeister never was removed as such director. That she was duly elected such director at the meeting held on the 30th day of October, 1909, and never resigned as such, and has been a director since 1905, nor was she ever legally removed or ceased to act as director, and she is still an owner and holder of five (5) shares of stock of the said corporation. That the said five (5) shares of stock were delivered by Anna Hachemeister to William G. Ringler in his lifetime, for safe-keeping, and that without her knowledge, consent or acquiescence, the five (5) shares of stock were, in or about the month of March, 1910, canceled by George Ehret, Jr., and George F. Trommer, without authority on her part, exchanging said stock certificate in her name, which stock certificate was No. 338 of the stock of George Ringler & Co., for stock certificate No. 344, and that thereafter the said stock certificate No. 344 was exchanged by said executors for stock certificate No. 345, in the name of George Ehret, Jr., and that the said Anna Hachemeister never ceased to be a stockholder of said corporation.

That annexed hereto is a copy of the sections of the by-laws relating to the ownership of stock for the election of trustees, and filling of vacancies in the board of trustees.

The present stockholders of record are George F. Trommer and George Ehret, Jr., as executors of William G. Ringler, deceased, 2,975 shares; George Ehret, Jr., 5 shares; John T. Wilson, 5 shares; Isaac Kugelman, 5 shares; Arthur Strauss, 5 shares; and your petitioners as administrators with the will annexed, and J. Edward Jetter, as trustee of Henry Hachemeister, deceased, 3,000 shares.

Annexed hereto is a copy of the certificate of incorporation of said corporation.

That your petitioners did not discover all the facts set forth herein until on or about the 1st day of August, 1910, and have made this application upon the earliest opportunity.

That on or about the 1st day of August, 1910, in an action brought in the Supreme Court, Richmond county, by Anna Hachemeister, plaintiff, against George Ringler & Co., George F. Trommer and George Ehret, Jr., individually and as executors of the last will and testament of William G. Ringler, deceased, Isaac Kugelman, Arthur Strauss and John T. Wilson, defendants, to cancel the said transfers by George F. Trommer and George Ehret, Jr., and to restrain the negotiation of said stock, an answer was interposed by all of the defendants, in which it was alleged that the stock of George Ringler & Co., prior to the 17th day of February, 1910, while standing in the name of George F. Trommer five (5) shares, Isaac Kugelman five (5) shares, Arthur Strauss five (5) shares, did not belong to the aforesaid Trommer, Kugelman and Strauss, and the same allegation is set forth in the amended answer served on the 23d day of August, 1910, upon the attorneys for Anna Hachemeister, the petitioner herein, in said action.

It is also admitted by the pleadings in the said action, and by the affidavits submitted upon the motion for an injunction restraining the negotiation of the said stock transferred to George Ehret, Jr., as aforementioned, that John T. Wilson is not the beneficial owner of the stock held in his name.

That in said action a motion has been granted, restraining the negotiation of the said stock issued as aforesaid to George Ehret, Jr., and said motion was granted on September 14, 1910, and an order has been signed by Mr. Justice Putnam, who heard said motion.

That your petitioners are aggrieved by and complain of such elections of trustees and officers of the corporation as held on the 30th day of October, 1909, and February 28, 1910, and March 4, 1910, and the proceedings, acts and matters touching the same, and allege that the value of their stock has been injuriously affected by the acts of said persons assuming to act as directors, by virtue of said illegal proceedings.

WHEREFORE, the petitioners pray that such elections held on October 30, 1909, February 28, 1910, and March 4, 1910, may be declared by this court to be irregular and of no effect, and be set aside, and the offices of all such directors be declared to be vacated, and that all persons assuming to be directors and trustees cease to act as such, and that a new election for the directors and trustees of such corporation be ordered by this court, and that inspectors for such elections be appointed by the court, and for such further relief as right and justice may require.

An order to show cause is asked for, on the ground that a speedy determination of the proceeding should be had, so that the present ineligible directors are ousted from their offices at the earliest opportunity. No previous application has been made for the annexed order to show cause.

Dated, New York, *September 27, 1910.*
(Signatures and verification.)

Order to Show Cause.

(Title.)

Upon reading the petition of Anna Hachemeister and J. Edward Jetter, as administrators with the will annexed of Henry Hachemeister, deceased, and J. Edward Jetter as substituted trustee under the will of Henry Hachemeister, deceased, and of Anna Hachemeister individually, duly verified the 28th day of September, 1910, and the exhibits thereto annexed.

Let George Ringler & Co., George F. Trommer and George Ehret, Jr., individually and as executors of William G. Ringler, deceased, Isaac Kugelman, Arthur Strauss and John T. Wilson, show cause at Special Term, Part I., of the Supreme Court, New York county, at the County Court House, borough of Manhattan, city of New York, on the 7th day of October, 1910, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made setting aside the elections of the corporation of George Ringler & Co. of October 30, 1909, February 28, 1910, and March 4, 1910, and vacating the offices of all the directors and trustees of said corporation, and directing such directors and trustees to cease to act as such, and directing a new election of the directors and trustees of such corporation, and appointing inspectors for such new election, and why the petitioners should not have such other and further relief as right and justice may require.

Sufficient reason appearing therefor, let service of a copy of this order and the annexed petition and exhibits thereto annexed, on the aforesaid George Ringler & Co., George F. Trommer and George Ehret, Jr., individually and as executors of William G. Ringler, deceased, Isaac Kugelman, Arthur Strauss and John T. Wilson on or before the 5th day of October, 1910, be deemed sufficient service herein.

Dated, New York, *October 4, 1910.*

CHARLES L. GUY,
Justice of the Supreme Court.

Although, where a transfer of stock is made in good faith, and the transferee actually holds the stock during his incumbency of office, such transferee is a stockholder within the purview of the law, and that fact is conclusive upon the inspectors of election both as to the right of these apparent holders to vote upon the stock, and as to their eligibility to the offices of directors or trustees, that record is not binding upon the court in a proceeding under the statute to investigate the election of corporate officers, which has expressly conferred the power and imposed the duty to make an investigation of the facts and give judgment accordingly. Where directors *de facto* but not *de jure* elected other persons as directors to fill vacancies, the title to the office of the persons so elected is no better than that of the directors who took part in their election. *Matter of Ringler & Co.*, 204 N. Y. 30, rev'g 45 App. Div. 361.

CORPORATION, NAME, CHANGE OF.

GENERAL CORPORATION LAW, §§ 60-65.

- § 60. *Petition by corporation to change name*, 902.
- § 61. *Contents of petition*, 902.
- § 62. *Notice of presentation of petition*, 903.
- § 63. *Order authorizing change*, 903.
- § 64. *When change to take effect*, 903.
- § 65. *Substitution of new name in pending action or proceeding*, 904.

Sections of Code so Far as They Relate to Changes of Names of Corporations Transferred to Consolidated Statutes (General Corporation Law).

Code.	General Corp. Law.	Code.	General Corp. Law.
Sec. 2411.....	To Sec. 60	Sec. 2414.....	To Sec. 63
2412.....	61	2415.....	64
2413.....	62	2416.....	65

PRECEDENTS.

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§ 60 (Formerly Code, § 2411). *Petition by corporation to change name.*

A petition to assume another corporate name may be made by a domestic corporation, whether incorporated by a general or special law, to the Supreme Court at a Special Term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a Special Term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance, or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved if a banking corporation, by the superintendent of banks; if an insurance corporation by the superintendent of insurance, and if a railroad corporation, by the public service commission. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of State, that the name which such corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive.

Consolidators' note. Code Civ. Pro., §§ 2411 to 2416, have been consolidated in this article so far as they relate to change of name of a corporation. The portions of these sections relating to the change of the name of an individual have been left in the Code of Civil Procedure. The last sentence has been omitted from section 63, because consolidated in County Law, section 161, subdivision 6.

§ 61 (Formerly Code, § 2412). *Contents of petition.*

The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, its present name and the name it proposes to assume, which must not be the name of any other corporation, or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

§ 62 (Formerly Code § 2413). Notice of presentation of petition.

If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in a newspaper in every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation, by the superintendent of insurance, or if a railroad corporation, by the public service commission. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a domestic corporation organized under or subject to the religious or membership corporation law the court may dispense with the publication of the notice of the presentation of such petition or require notice of such presentation be given to such persons and in such manner as the court thinks proper. (As amended 1910.)

A copy of the petition and notice of motion shall be filed with the secretary of state and the proposed name shall thereupon be reserved for said corporation until three weeks after the date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state.

§ 63 (Formerly Code § 2414). Order authorizing change.

If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted, or in the office of the clerk of the county in which the special term granting the order is held; and that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of state; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation, in the office of the superintendent of insurance, or if it be a railroad corporation, in the offices of the public service commissions. Such order shall also direct the publication, within ten days after the entry thereof of a copy thereof, in a designated newspaper, in the county in which the order is directed to be entered, once in each week for four successive weeks. The court may dispense with the publication of a copy of such order and require notice to be given to such persons and in such manner as it thinks proper if the petition be made by a domestic corporation organized under or subject to the religious or membership corporation law. (Amended 1910.)

§ 64 (Formerly Code § 2415). When change to take effect.

If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof

are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name. No proceedings had prior to April fourth, eighteen hundred and ninety-four, under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

§ 65 (Formerly Code, § 2416). Substitution of new name in pending action or proceeding.

An action or special proceeding, civil or criminal, commenced by or against a corporation, whose name is so changed shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time, obtain an order amending any of the papers, or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

In *Matter of the Application of U. S. Mercantile & Reporting Agency, Ltd., for Leave to Change Its Name*, 115 N. Y. 176, it was held that the moving corporation has no absolute right to change the name, but the matter is in the discretion of the court, and its decision, where no abuse of the discretion is shown, is not reviewable in the Court of Appeals. It seems that where no objections whatever existed, or one which furnished any reason for a refusal of the application, the Court of Appeals might interfere; but where the objections are such as to the reasonableness of which judgments might fairly differ the decision below is conclusive.

Such an order should not be granted where there is a danger of confusion by reason of the similarity of names with that of an existing corporation, and the fact that such confusion might arise forms a reasonable ground for a refusal to grant the petition. *Matter of Manhat. Dispensary*, 7 St. Rep. 871.

Where there are two bodies claiming the same name, one of which had obtained the name on petition under this title, the order granting the change of name will be vacated where the petition did not set forth the exact fact with respect to the two bodies claiming the same name, though there is no provision of the Code expressly giving the court power to revoke or vacate its order authorizing a change of name, yet such power is inherent, for courts of record by common law have absolute control of their own orders and judgments, and power to modify or vacate them whenever it is required in the interests of justice. *Matter of Abyssinia Baptist Church*, 37 St. Rep. 766, 13 Supp. 920.

A corporation existing under the laws of the State of New York cannot, in legal proceedings, be properly designated by two names, and cannot, except as authorized by law, change its name, either directly or by user, nor can the public give it a name by which it can be recognized in judicial proceedings, other than that of its creation.

An existing corporation is entitled to protection against the use of a similar name by a competing junior corporation.

Where an application is made by a corporation for a change of its name, which is opposed by another corporation on the ground that the proposed new name of the petitioner will result in confusion, the absence of any element of fraud is not controlling, as the court, apart from any question of fraud or fraudulent intent, will interfere where there is reasonable ground to conclude that the granting of the application will result in injury to the complaining corporation, or in imposition or deceit upon the public, by destroying the identity of such corporations. *Matter of U. S. Mortgage Co.*, 83 Hun, 572, 32 Supp. 11.

Precedents in Proceeding to Change Corporate Name of Membership Corporation.

Petition.

SUPREME COURT — MONROE COUNTY.

IN THE MATTER OF THE APPLICATION OF THE
ROCHESTER BAPTIST MISSIONARY
UNION TO CHANGE ITS NAME TO THE
ROCHESTER BAPTIST CITY MISSION
SOCIETY.

To the Supreme Court:

The petition of the Rochester Baptist Missionary Union respectfully shows:

1. That your petitioner is a membership corporation organized to assist in the erection and maintenance of Baptist churches in the city of Rochester, N. Y., and that said corporation was organized under section 319 of the Laws of 1848.

2. That the present name of your petitioner is the Rochester Baptist Missionary Union and your petitioner is desirous of changing such name to the Rochester Baptist City Mission Society; that the reason for the change of name is that the new proposed name will more fully describe the objects and aims of your petitioner (other reasons may be given), and is desired by a majority of the members and trustees comprising the membership of your petitioner.

3. That annexed hereto is a certificate of the Secretary of State that the name which your petitioner proposes to assume is not the name of any other religious corporation or a name which he deems so nearly resembling it to be calculated to deceive.

WHEREFORE, your petitioner prays that the name of your petitioner be changed from the Rochester Baptist Missionary Union to the Rochester Baptist City Mission Society.

ROCHESTER BAPTIST MISSIONARY UNION,
(Add verification.) By STANTON B. VAN NESS,
Vice-President.

Resolution.

By Mr. BROWN:

Resolved, that the vice-president of this corporation take such legal steps as may be necessary to change the corporate name from the Rochester Baptist Missionary Union to the Rochester Baptist City Mission Society and that the attorney for the corporation make application to the Supreme Court and take such other steps as may be necessary to secure such change of name.

Adopted.

The undersigned secretary of the Rochester Baptist Missionary Union does hereby certify that the foregoing resolution was unanimously adopted at the regular meeting of the board of trustees of the Rochester Baptist Missionary Union, held at Rochester, on the . . . day of May, 1911.

H. K. PHINNEY,
Secretary.

Certificate of Secretary of State.

STATE OF NEW YORK, }
OFFICE OF SECRETARY OF STATE, } ss.:

This is to certify that I have examined the indices to the names of domestic corporations, the certificates of incorporation of which are filed or recorded in this office, and find that the name Rochester Baptist City Mission Society is not the name of any other domestic corporation, the certificate of incorporation of which is filed or recorded in this office or a name so nearly resembling the name of any other such domestic corporation as to be calculated to deceive.

Witness my hand and the seal of the office of the Secretary of State at the city of Albany this 10th day of May, 1911.

JOSE E. PIDGEON,
Second Deputy Secretary of State.

[SEAL]

(Title.)

Notice of Motion.

To Whom It May Concern:

Please to take notice that an application will be made at a Special Term of the Supreme Court to be held at the courthouse in the city of Rochester, on the 10th day of June, 1911, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for a rule or order permitting the Rochester Baptist Missionary Union, a membership corporation, to change its corporate name to the Rochester Baptist City Mission Society and for such other further order or relief as may be just.

Dated, May 15, 1911.

H. F. REMINGTON,
Rochester, N. Y.

(Attach proof of publication of above notice for three successive weeks in compliance with section 62 of General Corporation Law.)

(Title.)

Order Authorizing Change of Name.

(Special term caption.)

The Rochester Baptist Missionary Union having presented a petition asking leave to change its corporate name to the Rochester Baptist City Mission Society and having presented a certificate of the Secretary of State that the Rochester Baptist City Mission Society is not the name of any other domestic corporation, the certificate of which is filed or recorded in the office of the Secretary of State, or a name so nearly resembling the name of any other such domestic corporation as to be calculated to deceive, and having presented proof of publication of notice of the presentation of this petition to change its corporate name and the court being satisfied that the petition of the petitioner is true and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized, and after hearing H. F. Remington, attorney for petitioner and on his motion, it is hereby

Ordered, that the Rochester Baptist Missionary Union be and it hereby is authorized to assume the name of the Rochester Baptist City Mission Society on and after the 15th day of July, 1911; and it is further

Ordered, that this order be entered in the clerk's office of Monroe county where the certificate of incorporation of the petitioner is filed and that a certified copy of this order shall in ten days after the entry thereof be filed in

the office of the Secretary of State and that a copy of this order be published in the *Daily Record*, a newspaper published in Rochester, N. Y., once a week for four successive weeks.

JAMES L. HOTCHKISS,
Clerk.

(Order to be published once a week for four successive weeks. Section 63, Gen. Corp. Law.)

Precedents in Proceeding to Change Corporate Name of Business Corporation.

Petition.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE APPLICATION OF THE
PNEUMATIC CAISSON COMPANY FOR
AUTHORITY TO CHANGE ITS NAME TO THE
CAISSON COMPANY.

To the Supreme Court, New York County:

The petition of the Pneumatic Caisson Company respectfully shows to this court as follows:

1. That it is a domestic stock corporation, incorporated under the Business Corporations Law of the State of New York; that its certificate of incorporation was filed in the office of the clerk of the county of Rensselaer, State of New York, as its principal place of business was formerly in the city of Troy, in said county of Rensselaer. That under the direction of the board of directors of said corporation its principal place of business was removed to, and is now in, the borough of Manhattan, city, county and State of New York; and a certificate of said removal has been duly filed in the office of the Secretary of State, and in the office of the clerk of the county of Rensselaer and in the office of the clerk of the county of New York.
2. That it is engaged in the business of foundation contracting of all kinds.
3. That its present name is The Pneumatic Caisson Company; that it prays that it may be authorized to adopt the name of The Caisson Company.
4. That the name, The Pneumatic Caisson Company, is unnecessarily long and causes extra expense to your petitioner whenever it is painted upon the plant or other property of your petitioner.
5. That your petitioner undertakes foundation contracts of all kinds, and the scope of your petitioner's work, as indicated by its corporate name, is enlarged by dropping the word "Pneumatic," as there are many kinds of caissons, and the "Pneumatic" implies the use of pneumatic caissons only.
6. That your petitioner is generally known and referred to by those with whom it does business as "The Caisson Company," and the superfluity of the word "Pneumatic" is shown by the general custom.
7. That, as evidenced by the certificate of the Secretary of State annexed hereto, the name, "The Caisson Company," is not the name of any other corporation incorporated or authorized to do business in the State of New York, or one so nearly resembling it as to be calculated to deceive.
8. That this application has been duly authorized by resolution of your petitioner's board of directors adopted at a meeting regularly held on the 21st day of November, 1910.

Dated, February 21, 1911.

THE PNEUMATIC CAISSON COMPANY,
By OLIVER C. EDWARDS, JR.,
President.

(Title.)

Notice of Motion.

Notice is hereby given that The Pneumatic Caisson Company, a domestic corporation having its principal business office in the borough of Manhattan, city, county and State of New York, will apply to the Supreme Court of the State of New York, at Special Term, Part I. thereof, to be held at the County Court House in the borough of Manhattan, city and county of New York, on the 21st day of March, 1911, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order authorizing said corporation to change its corporate name to The Caisson Company.

Dated, *February 21, 1911.*

THE PNEUMATIC CAISSON COMPANY,
By OLIVER C. EDWARDS, JR.,
President.

(Add proof of publication of notice of motion in newspapers required by section 62 of General Corporation Law; certificate of filing of copy of petition and notice of motion in office of Secretary of State; certificate of Secretary of State that proposed new name is not the name, or similar to the name of any other business corporation, as required by said section 62.)

Proceedings of Board of Directors.

At a meeting of the board of directors of The Pneumatic Caisson Company, held at No. 200 Fifth avenue, New York, N. Y., November 21, 1910, on motion it was

Resolved, that the corporate name of this company be changed from "The Pneumatic Caisson Company," to "The Caisson Company," and that application be made to the Supreme Court for authority therefor; and that the president of the company be empowered to do all things requisite to effect such change. Seconded and unanimously adopted.

I, Frank J. Lovering, assistant secretary of The Pneumatic Caisson Company, in the absence of the secretary, hereby certify that the above are true copies of resolutions of the board of directors of The Pneumatic Caisson Company, adopted at meetings held November 9, 1910, and November 21, 1910, which were duly called and at which a quorum was present.

FRANK J. LOVERING,
Assistant Secretary.

Order Authorizing Change of Name.

SUPREME COURT—NEW YORK COUNTY.

(Special Term Caption.)

IN THE MATTER OF THE APPLICATION OF THE
PNEUMATIC CAISSON COMPANY FOR
AUTHORITY TO CHANGE ITS NAME TO THE
CAISSON COMPANY.

Upon reading and filing the petition of The Pneumatic Caisson Company, a domestic stock corporation, duly verified by Oliver C. Edwards, Jr., its president, wherein said petitioner prays for an order authorizing it to assume another corporate name, to wit, the name of The Caisson Company, and a copy thereto annexed of the resolution of the board of directors of said corporation authorizing this application; and upon filing the certificate of the Secretary of State annexed thereto certifying that the name which said corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it as to be calculated to deceive; and upon filing due proof by affidavits, showing that notice of the presentation of said petition has been duly published once a week for three successive weeks in *The New York Law Journal*, a daily newspaper published

in the said county of New York, and in *The New York Press*, a daily newspaper published in the said county of New York, in which county the said corporation has its principal office and place of business; and the court being satisfied by said petition, and by the affidavits and certificates presented therewith that the petition is true, and that there is no reasonable objection to the change of name proposed, and that the petition has been duly authorized, and that notice of the presentation of the petition as required by law has been made:

Now on motion of Cornelius P. McLaughlin, attorney for the petitioner, no one opposing, it is

Ordered, that the said petition be and the same is hereby granted, and that the petitioner herein, The Pneumatic Caisson Company, be and it hereby is authorized to assume another corporate name, to wit, the name of The Caisson Company, on and after the 10th day of May, 1911; and it is further

Ordered and directed, that this order be entered, and that the papers on which it is granted be filed within ten days from the date hereof, in the office of the clerk of Rensselaer county, the county in which the certificate of incorporation of said corporation is filed, and that a certified copy of this order within ten (10) days after the entry thereof be filed in the office of the clerk of New York county, the county in which the principal place of business of said corporation is located, and that a certified copy of this order within ten days after the entry thereof be filed in the office of the Secretary of State, and that a copy of this order be published once a week for four successive weeks in *The Troy Times*, a newspaper published in said county of Rensselaer, and in *The New York Law Journal*, a newspaper published in the county of New York, beginning within ten (10) days after the entry hereof, and that this order and the papers upon which is granted be transferred to the office of the clerk of Rensselaer county.

Enter:

SAMUEL GREENBAUM,
Justice Supreme Court.

CORPORATE REAL PROPERTY, SALE OF.

ARTICLE. General Corporation Law, §§ 70-76.

I. APPLICATION OF THIS ARTICLE. 911.

§ 70, *General Corporation Law. Application of this article*, 911.

§ 8, *Joint-Stock Association Law. Proceeding to mortgage, lease or sell real estate*, 911.

§ 12, *Religious Corporations Law. Sale, mortgage and lease of real property of religious corporations*, 911.

§ 13, *Membership Corporations Law. Purchase, sale, mortgage and lease of real property*, 911.

II. THE PETITION. § 71, 914.

§ 71, *General Corporation Law. Petition*, 914.

III. HEARING; ORDER; WHEN NOTICE REQUIRED. §§ 72-75, 916.

§ 72, *General Corporation Law. Hearing on application*, 916.

§ 73, *General Corporation Law. Order to sell, mortgage or lease*, 917.

§ 74, *General Corporation Law. Insolvent corporation*, 917.

§ 75, *General Corporation Law. Service of notices*, 917.

IV. PRACTICE IN CASES NOT HEREIN PROVIDED FOR. § 76, 919.

§ 76, *General Corporation Law. Practice in cases not herein provided for*, 919.

V. PRECEDENTS, 919.

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SECTIONS OF GENERAL CORPORATION LAW AND WHERE FOUND.

SEC.	ART.	PAGE.
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13. Membership Corporations Law. Purchase, sale, mortgage and lease of real property	1	911

Sections 3390-3396 have been Transferred from the Code to the Consolidated Statutes, General Corporation Law, as follows:

Code.	General Corp. Law.	Code.	General Corp. Law.
Sec. 3390	To Sec. 70	Sec. 3394	To Sec. 74
3391	71	3395	75
3392	72	3396	76
3393	72, 73		

Code.	Joint-Stock Ass'n Law.
Sec. 3390	To Sec. 8

ARTICLE I. APPLICATION OF THIS ARTICLE.

§ 70, *General Corporation Law. Application of this article, 911.*

§ 8, *Joint-Stock Association Law. Proceeding to mortgage, lease or sell real estate, 911.*

§ 12, *Religious Corporations Law. Sale, mortgage and lease of real property of religious corporations, 911.*

§ 13, *Membership Corporations Law. Purchase, sale, mortgage and lease of real property, 911.*

§ 70. (Formerly Code, § 3390).

Whenever any corporation is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this article.

Consolidators' note to article 4. Code of Civil Procedure, sections 3390-3396, so far as they relate to proceedings for the sale of the real property of a corporation, have been consolidated in this article, and the portion relating to the sale of the real property of a joint-stock association has been consolidated in Joint-Stock Association Law, section 8.

JOINT-STOCK ASSOCIATION LAW.

§ 8. Proceeding to mortgage, lease or sell real estate.

Whenever any joint-stock association is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had as prescribed for corporations in article four of the general corporation law. (Code Civ. Pro., § 3390.)

RELIGIOUS CORPORATIONS LAW.

§ 12. Sale, mortgage and lease of real property of religious corporations.

A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the code of civil procedure. * * *

MEMBERSHIP CORPORATIONS LAW.

§ 13. Purchase, sale, mortgage and lease of real property.

No purchase, sale, mortgage or lease of real property shall be made by a membership corporation, unless ordered by the concurring vote of at least two-thirds of the whole number of its directors, provided, however, that when the whole number of directors is not less than twenty-one, the vote of a majority of the whole number shall be sufficient.

No real property of a membership corporation located within this state shall, without leave of the court, be leased for a longer period than five years, or sold or mortgaged. A mortgage may be executed to secure the payment of such bonds issued or to be issued to different persons. The court may grant leave to a membership corporation to convey real property, without consideration, to another membership corporation created for the same or kindred purposes.

If a conveyance or mortgage of the real property of any such corporation located within this state has been or shall be executed and delivered without leave of the court, obtained as required by law, the court may, thereafter upon the application of the corporation or of the grantee or mortgagee in any such conveyance or mortgage, or any person claiming under such grantee or mortgagee, upon notice to such corporation, confirm such previously executed conveyance or mortgage shall be as valid and of the same force and effect as if it had been executed and delivered with leave of the court, except as to purchasers or mortgagees of record of such real property, subsequent to the execution and delivery of such conveyance or mortgage. * * *

The history of legislation on this subject, in England as well as in this State, is considered in *De Ruyter v. The Trustees of St. Peter's Church*,

3 Barb. Ch. 119, and it seems that a common-law religious corporation had a right to alienate its real estate in the same manner as other corporations, until the time of Elizabeth, when statutes were passed restraining the alienation of real estate by such corporation, and these restrictions were held to be part of the common law of this State, although not re-enacted here. It is held in *Montgomery v. Johnson*, 9 How. 232, that the common-law principle that corporations, unless restrained by charter or statute, have power to sell, co-extensive with that of natural persons, does not apply to religious corporations. See, however, 10 Abb. Pr. N. S. 484. In *Matter of Reformed Dutch Church of Saugerties*, 16 Barb. 237, the statute is construed as prohibiting alienation of church property except by order of the court. The same case reiterates the rule of the statute (Code Civ. Pro., § 217), that the Supreme Court is vested with the powers conferred upon the chancellor by the statute. The County Court has jurisdiction under the provisions of section 340, subdivision 4, Code of Civil Procedure.

Religious corporations have no common-law right to alienate their real estate, and to constitute a sale within the meaning of section 11. There must be a valuable consideration inuring to the corporation as such; therefore, an order of the Supreme Court, authorizing a conveyance founded upon a petition showing the only consideration for the contemplated transfer to be a benefit to the original corporators, is without jurisdiction, and a deed executed in pursuance thereof is void. *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131.

The Supreme Court has no power to direct or require the corporation to sell against its will. It may withhold its assent to the sale, and thus prevent the disposition of the property. This is the extent of its power. *Matter of Reformed Church of Saugerties*, *supra*. So the County Court has only the special jurisdiction conferred on the chancellor by the statute, to direct the sale and application of the proceeds of the property of a religious corporation. It cannot increase or enlarge the powers of the trustees to appoint a receiver to dispose of the proceeds. The court has no power to order a sale for the purpose of closing up the existence of the society and distributing its property. *Wheaton v. Gates*, 18 N. Y. 395.

A religious or charitable corporation cannot mortgage its real estate without leave of the Supreme Court, and if it does so the mortgage is void. *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451, 53 St. Rep. 19, *aff'd* 65 Hun, 21, 47 St. Rep. 60, 19 Supp. 605.

It is said, in a note to *Matter of Church of the Messiah*, 25 Abb. N. C. 354, that it has long been the practice of the Supreme Court to entertain applications for leave to mortgage real estate of religious corporations under the provisions of the act of 1813 authorizing the chancellor to grant leave to sell, the mortgage being regarded merely as a conditional sale.

Any question which may have existed as to the power of the court to grant leave to mortgage, the necessity of obtaining such leave, the proceedings, and the scope of the order directing the disposition of the proceeds are set at rest by the act of 1890.

The authority of the court to make an order for sale of real estate of a religious corporation relates to cases where the absolute right and title to lands belonging to the corporation is to be sold, and such assent is not necessary in case of the sale of a pew where the right of the owner is limited. *Freligh v. Platt*, 5 Cow. 494; *Voorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 137; s. c., 17 Barb. 104.

The jurisdiction of a court to order a sale depends upon the facts before it at the time of making the order, and cannot be upheld by proof that facts which would have justified the order existed, but were not brought to its attention. *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 73 N. Y. 82, aff'g in part and rev'g in part 41 Super. Ct. 360.

The Society of Shakers is not a religious corporation of such a character that a legislative act or approval of a court is necessary to enable it to dispose of its property. *Feiner v. Reiss*, 98 App. Div. 40, 90 Supp. 568.

A religious corporation may sell buildings severed from land without leave of the court. *Beach v. Allen*, 7 Hun, 441. An order of the court is not necessary to enable a religious corporation, owning a cemetery, to convey burial lots therein to individuals for purposes of sepulture. So held in *Copper's Case*, 7 Abb. N. C. 121; rev'd on appeal without opinion, as *Coppers v. Trustees*, 21 Hun, 233. A grant of a right of burial upon church property does not require an order of the court. So held where the conveyance purported to convey the fee, but for specific purposes of burial. *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42; *Matter of Reformed Church of New York*, 7 How. 476. In *Protestant Reformed Church of Rosendale v. Bogardus*, 5 Hun, 304, it is questioned whether the right of way over property belonging to the church is such an interest in land as requires the authority of the court for its sale by a religious corporation. It is not necessary to obtain the order of the court to authorize a change of location of church edifice. *Matter of Second Baptist Church of Canaan*, 20 How. 324. The act gives to religious corporations the unlimited right to convey real estate, provided the consent of the court is given, as required by the act. *The Reformed Protestant Dutch Church in Garden Street v. Mott*, 7 Paige, 77.

The above cases must be considered with reference to the Code provisions and statutes existing at the time of decision, and their present application taken with reference to the laws now in force.

It should be noted that this article, requiring application to the court for leave to mortgage, lease, or sell corporate real estate, applies only when leave of court so to do is required of the corporation.

A religious corporation to which is devised, under the residuary clause of a will, lands which the testatrix had before her death contracted to sell and convey, takes the legal title to such lands under the will merely as a trustee for the vendee, to whom it is bound to convey upon the vendee's performance of the contract; and leave of the court is not required to authorize a conveyance by the corporation to the vendee. *Edelstein v. Hays*, 50 Misc. 130, 100 Supp. 403.

If a conveyance of land be made to a religious corporation absolutely and without condition or reservation, no trust is created beyond the duty imposed by law upon the corporation of using this property for the purposes of its creation. As there is no trust fastened upon the land, the corporation may, with judicial consent, sell and convey a good title, the proceeds in such case taking the place of the land. *Matter of First Presbyterian Society of Buffalo*, 106 N. Y. 251.

Upon the foreclosure of a mortgage given by a religious or charitable corporation, without leave of court, which is therefore void, the court will not allow the plaintiff to prove the loan and recover a judgment at law on the debt. *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451, 53 St. Rep. 19. It seems that a cemetery association, whose land cannot be used for cemetery purposes on account of a city ordinance, upon applying for a voluntary dissolution, should dispose of its land in the mode provided for in the case of the dissolution of corporations. *People ex rel. O. H. C. Assoc. v. Pratt*, 129 N. Y. 75.

The Supreme Court will not grant leave to sell property of a Presbyterian church on its petition as a secular corporation when its ecclesiastical dissolution has been affirmed by the highest appellate tribunal of the church, and actions are pending involving the right of possession and control of the property. *Matter of Westminster Presbyterian Church*, 137 App. Div. 301, 121 Supp. 1039.

A religious corporation, which without permission of court has alienated its real estate and received the consideration, is, on offering to return the consideration, entitled to a decree rescinding the sale in an action brought for that purpose. In such an action the court will not authorize the sale *nunc pro tunc* when there is no allegation or proof that the religious corporation has been benefited by the sale. *Associate Presbyterian Congregation v. Hanna*, 113 App. Div. 12, 98 Supp. 1082.

ARTICLE II.

THE PETITION. § 71.

§ 71 (Formerly Code, § 3391). Petition.

The proceeding shall be instituted by the presentation to the supreme court of the district or the county court of the county where the real property, or some part of it,

is situated, by the corporation applicant, of a petition, setting forth the following facts:

1. The name of the corporation and of its directors, trustees or managers, and of its principal officers, and their places of residence.
 2. The business of the corporation or the object or purpose of its incorporation, and a reference to the statute under which it was incorporated.
 3. A description of the real property to be sold, mortgaged or leased, by metes and bounds, with reasonable certainty.
 4. That the interests of the corporation will be promoted by the sale, mortgage or lease, of the real property specified, and a concise statement of the reasons therefor.
 5. That such sale, mortgage or lease has been authorized, by a vote of at least two-thirds of the directors, trustees or managers of the corporation, at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.
 6. The market value of the remaining real property of the corporation, and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.
 7. The application proposed to be made of the moneys realized from such sale, mortgage or lease.
 8. Where the consent of the shareholders, stockholders or members of the corporation, is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.
 9. A demand for leave to mortgage, lease or sell the real estate described.
- The petition shall be verified in the same manner as a verified pleading in an action in a court of record.

A contract may be entered into before the order of sale is made, and it will be sufficient if the authority is obtained before the deed is made. *Congregation Beth Elohim v. Central Presbyterian Society*, 10 Abb. Pr. N. S. 484; *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 30 How. 455. But it is not absolutely necessary for the petitioners to show that they have agreed with a purchaser. An order may be made directing a sale at a price not less than a sum named, and in case no purchaser is found at such price, sale cannot be had under the order. *Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155. A corporation has power to contract for sale before order of court is granted, subject to approval of the court. It is not necessary or desirable that the sanction of the court should precede the negotiation. *Brown v. First Presbyterian Congregation*, 6 Bosw. 243.

The proceedings upon the application by a religious corporation to mortgage its real estate are regulated by this title, and the petition must conform to the requirements of section 3391. *Matter of Church of the Messiah*, 25 N. C. 354, 12 Supp. 489. *Quære* as to whether the consent of the presbytery was necessary to the sale of the real property of the Presbyterian church under the Laws of 1875, chapter 79, Laws of 1876, chapter 110. It was held, however, that where there had been consent of the presbytery to such sale, provided a majority of the congregation should so decide in public meeting assembled, followed by a regular meeting called by the trustees at which, of 137 members entitled to vote, 87 voted, and of these 66 voted in favor of the sale, and 24 of those who did not vote

signed the paper approving the sale, that under these circumstances the conditions imposed on the corporation were complied with and a sale was authorized. *Held*, also, that in the absence of proof that any lawful vote was excluded, or any unlawful vote admitted, the want of a proper register did not invalidate the vote taken. *Matter of First Presbyterian Society of Buffalo*, 106 N. Y. 251. Under Laws of 1813, chapter 60, it is competent for the court to authorize a sale of the property of a religious corporation for the purpose of paying its debts, as distinguished from a sale or transfer for the purpose of consolidation and practical dissolution. *Lynch v. Pfeiffer*, 110 N. Y. 33, aff'g 38 Hun, 603.

It was held in *Wyatt v. Benson*, 23 Barb. 327, apparently upon the authority of *People v. Fulston*, 11 N. Y. 94, and *Robertson v. Bullions*, 11 N. Y. 243, that the application must be made by and in the name of the corporation, and that the court had no power to grant an order of sale upon the application of the trustees or otherwise than upon the application of the corporation; but in *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131, it is held that, under the act to provide for the incorporation of religious societies, the trustees of such a corporation are authorized to act in its behalf in taking the steps required for effecting a sale of its real estate, and their acts are binding upon it, although it does not appear that they had the express sanction or authority of a majority of the corporation. The same case is reported in 73 N. Y. 82, on a subsequent appeal. It is said in *Re St. George's M. E. Church*, 21 Wkly. Dig. 81, that a meeting of the corporation and vote of approval is not necessary to a valid sale, citing cases above, and 13 Abb. 414; *Matter of St. Ann's Church*, 23 How. 285. It is, however, usual to have a vote of the corporation. *Matter of Second Baptist Church in Canaan*, 20 How. 324. The consent of all the pewholders as such is not necessary to make out a case for leave for granting the trustees leave to sell a church edifice. *Matter of Brick Presbyterian Church*, 3 Edw. Ch. 155; *Matter of the Reformed Dutch Church*, 16 Barb. 237.

The application is to be made to the court at Special Term, or the County Court, which is always in session for that purpose.

ARTICLE III.

HEARING, ORDER; WHEN NOTICE REQUIRED. §§ 72-75.

§ 72. *Hearing on application*, 916.

§ 73. *Order to sell, mortgage or lease*, 917.

§ 74. *Insolvent corporation*, 917.

§ 75. *Service of notices*, 917.

§ 72 (Formerly Code, § 3392). *Hearing on application.*

Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer or creditor of the corporation or otherwise, in which case the application shall be heard at the

time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the court, with his opinion thereon. Any person, whose interests may be affected by the proceeding, may appear upon the hearing and show cause why the application should not be granted.

§ 73 (Formerly Code, § 3393). Order to sell, mortgage or lease.

Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation will be promoted thereby, an order may be granted authorizing it to sell, mortgage or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage or lease.

§ 74 (Formerly Code, § 3396). Insolvent corporation.

If the corporation is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.

§ 75 (Formerly Code, § 3395). Service of notices.

Service of notices, provided for in this article, may be made either personally or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.

The sale may be made by the trustees or by an officer appointed by the court. *De Ruyter v. St. Peter's Church*, 3 N. Y. 240. In case of the sale of the property of a religious corporation, with the assent of the court, the avails are not to be distributed among the original contributors and pewholders, but they are to be applied to such uses as the corporation, with the consent and approval of the court, shall conceive to be most for the interests of the society. It is the right of a church corporation to designate the object for which the moneys arising from a sale of its real estate shall be used. If the object thus designated meets the approval of the court, the appropriation will be made. If not, the money must be retained by the corporation until it can make such an application of it as will meet with the consent and approbation of the court. The court may withhold its assent, but it cannot direct the appropriation of the moneys in any specified manner. *Matter of Reformed Church of Saugerties*, 16 Barb. 237. The trustees have no right or authority to distribute the property of the society among the individual members, or any class of them, nor can it be conferred by a vote of the majority of the members and the order of the court. The court cannot approve of any plan for the distribution of the proceeds of the sale of the real estate which does not regard the interest of the society as an organization to continue for the purposes of its creation. Where it appears from the application that the sale is sought for the purpose of distributing the proceeds among the pewholders, the court has no jurisdiction to grant the application, and its order is inoperative. *Wheaton v. Gates*, 18 N. Y. 395; cited, *Madison Av. Baptist Church v. Baptist Church in Oliver Street*, 73 N. Y. 140. It seems that

the only way in which a religious corporation can divide its real estate and vest a portion thereof in a part of its congregation set off from the parent organization is by legislative enactment. *Reformed Church v. Schoolcraft*, 5 Lans. 210; aff'd, 65 N. Y. 135.

The order permitting the conveyance of real property by a religious corporation constitutes no estoppel in favor of a grantee who has parted with no consideration. *St. James' Church v. Church of the Redeemer*, 45 Barb. 356. The trustees of a religious corporation, making application to the court for leave to sell or mortgage its property, are not general but special agents, and if they act without authority the corporation is not estopped by the proceedings. *Moore v. Rector, etc., St. Thomas*, 4 Abb. N. C. 51. The trustees, however, in carrying out a contract of sale, have incidental power to agree to an extension of time for delivering the deed. *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr. N. S. 484. Where a religious corporation sold real estate, under an order of the court, to a *bona fide* purchaser, and received from him the value of the property, *held*, that a member of the corporation could not set up against the sale that by reason of irregularities in the proceedings the corporation did not give a valid title. *Watkins v. Wilcox*, 4 Hun, 220; aff'd, 66 N. Y. 654, on other points.

Plaintiff and defendant, religious corporations, united, the former conveying all its property to the latter, which assumed all the debts and took the corporate name; defendant paid the debts, took possession of the property under a sale made by order of the court, and maintained religious services. In a suit for recovery of its real property by plaintiff, it was held that these facts did not show a sale, and, therefore, that the court had no jurisdiction to order the sale; that plaintiff could redeem, but only on repaying to defendant the sums advanced on former indebtedness, with interest from the time defendants ceased to possess the property, and such other terms as were equitable, as set out in the opinion. A conveyance *ultra vires*, by a religious corporation, of its real estate cannot be held valid because it has executed and delivered its deed and received consideration therefor. *Madison Av. Baptist Church v. Baptist Church Oliver St.*, 73 N. Y. 82. A sale of its real estate by a religious corporation subject to the payment of all liens thereon and all debts of the society, including the floating debt, *held*, valid, the application for leave to the Supreme Court to make such sale having shown a necessity for such disposition of the property, and that it was for the best interests of the society. *Lynch v. Pfeiffer*, 38 Hun, 603.

The order granting leave to mortgage the real property of a religious corporation will direct the application of the proceeds. *Matter of Church of Messiah*, 25 Abb. N. C. 354, 12 Supp. 489.

A sale of church property was made by defendant, a religious cor-

poration, by order of the court to an individual upon the understanding that the property was to be by him conveyed to this plaintiff, another religious corporation. The grantor, by its rector and clerk, executed a conveyance containing the following restriction: "And the said party of the second part, for himself, his heirs and assigns, doth covenant and agree to and with the said party of the first part, its successors and assigns, that the party of the second part, his heirs and assigns, shall not at any time hereafter occupy or use said premises or any part thereof hereby conveyed, or permit the same to be occupied or used for any purpose other than church purposes only. And it is expressly understood that the said covenant shall attach to and run with the land." This clause was inserted in the deed by the officers who executed it without any direction or authority from the defendant. There is no mention of such a proposed restriction in the resolution authorizing the sale adopted by the vestry of the defendant, or in the petition presented to the Supreme Court stating the proposed terms of sale and asking the leave of the courts to carry it out, nor is any such restriction contained in the purchase-money mortgage taken back by the defendant. *Held*, that the defendant corporation, in the absence of a provision that the premises should revert to the defendant in case of breach, has, in equity no pecuniary interest remaining in the premises upon which it could base an action for damages in case of its breach or to maintain an action for an injunction to prevent the same. *St. Stephen's Church v. Church of Transfiguration*, 201 N. Y. 1, modif'g 137 App. Div. 945, 123 Supp. 1138.

ARTICLE IV.

PRACTICE IN CASES NOT HEREIN PROVIDED FOR. § 76.

§ 76 (Formerly Code, § 3396). Practice in cases not herein provided for.

In all applications made under this article, where the mode or manner of conducting any or all of the proceedings thereon is not expressly provided for, the court before whom such application may be pending, shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this article, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

ARTICLE V.

PRECEDENTS IN PROCEEDING FOR LEAVE TO SELL REAL ESTATE OF A RELIGIOUS CORPORATION.

Petition.

ALBANY COUNTY COURT.

IN THE MATTER OF THE APPLICATION OF
EVANGELICAL LUTHERAN CHURCH
OF THE REDEEMER OF ALBANY, N. Y.,
TO SELL REAL ESTATE.

To the County Court of the County of Albany:

The petition of the above-named corporation respectfully shows:

First. That its name is the Evangelical Lutheran Church of the Redeemer, Albany, N. Y., that its trustees are ten (10) in number, to wit (naming

them); that the said Rev. H. Douglas Spaeth is the president, Henry A. Bonhey is vice-president, Henry Hahn, financial secretary, John W. Bamer, treasurer, and Edward Osborn, recording secretary, and that all of them reside in the city and county of Albany.

Second. That the object or purpose of the incorporation of your petitioner is that of a religious purpose; that it was incorporated under chapter 60 of the Laws of 1813, with the amendments thereof, on the 13th day of March, 1899, by a certificate which was duly recorded in the clerk's office of the county of Albany on the 2d day of April, 1889, in Book 3 of Incorporations, page 226, and that said corporation was so formed for the purpose of conducting religious services under the form of government and doctrines of the Evangelical Lutheran Church.

Third. That the real property which the said corporation desires to sell is situated in the city and county of Albany and is bounded and described as follows:

(Insert description.)

Fourth. That the interest of said religious corporation will be promoted by a sale of the said parcel of land for the reason that the said strip of land is now unoccupied and unproductive and the purchaser is willing to covenant to keep the said parcel of land free and clear for the mutual benefit of himself and this corporation and the enjoyment of said parties for light and air of said parcel of land; that said parcel of land is of irregular shape and is valuable, mainly, to said corporation because of the advantages of light and air to be had therefrom, while said remaining and adjoining premises on the east are occupied by said corporation for its uses as a church and parsonage and upon which its said church and parsonage stand.

Fifth. That such sale has been authorized by a vote of at least two-thirds of the trustees of said corporation at a meeting thereof, duly called and held, a copy of which resolution granting such authority is hereto annexed; that such sale was also approved at a meeting of the members of the congregation, held on the 28th day of April, 1908.

Sixth. That the market value of the remaining real property of the said corporation is at least twelve thousand dollars (\$12,000), the cash value of its personal assets is at least one thousand dollars (\$1,000), and that the total amount of its debts and liabilities does not exceed the sum of fifty dollars (\$50), of which amount none is secured.

Seventh. The offer to purchase the said above described parcel of land was made by Henry C. Hewig and Mary Hewig, his wife, who agree to pay therefor the sum of two hundred and twenty-five dollars (\$225), subject to the condition that neither of said parties during the time or period that said corporation shall own, use or occupy the adjoining premises on the east, for religious or parsonage purposes, shall or will erect any building upon the said premises or use the same for the purposes of any business, trade or manufactory, or suffer or permit rubbish, ashes, boxes or any refuse whatever to be deposited or to remain on said premises, and that said corporation purposes to use the said sum of two hundred and twenty-five dollars (\$225), realized from such sale, for the general expenses of the corporation and for addition to the building fund.

Eighth. Said corporation, therefore, asks authority of this court to sell the real estate herein described to Henry C. Hewig and Mary Hewig, his wife, for the sum of two hundred and twenty-five dollars (\$225), subject to the conditions aforesaid.

Signatures of the ten (10) trustees.

(Joint and several verification by said trustees.)

Resolution.

At a meeting of the board of trustees of the Evangelical Lutheran Church of the Redeemer of Albany, N. Y., held on the 3d day of June, 1908, the

following resolution offered by Mr. John Reineck, more than two-thirds of said trustees being present and voting therefor, was adopted.

Resolved, that the Evangelical Lutheran Church of the Redeemer of Albany, N. Y., sell and convey to Henry C. Hewig and Mary Hewig, his wife, for the sum of two hundred and twenty-five dollars (\$225), a strip of land three (3) feet wide lying along and next adjacent to the east line of the premises now owned and occupied by said Hewig and wife, subject, however, to the condition that neither said grantees, nor their survivor, heirs or assigns, during the period that said grantors shall own, use or occupy said adjoining premises on the east for church, religious or parsonage purposes, shall or will erect any building upon said premises or use the same for any business, trade or manufacture, or suffer or permit rubbish, ashes, boxes or any refuse whatever to be deposited or remain on said premises.

Resolved, that the Rev. H. Douglas Spaeth, the president, and John W. Bamer, the treasurer, of the said corporation, be and they are hereby authorized to execute a deed of said premises on the part of said corporation and affix its corporate seal thereto.

Order Authorizing Sale.

(Caption and title.)

On reading and filing the petition of the Evangelical Lutheran Church of the Redeemer, Albany, N. Y., duly verified, by which it appears to the satisfaction of the court that the interest of the said corporation will be promoted by a sale of a strip or parcel of land lying along its western boundary to Henry C. Hewig and Mary Hewig, his wife, for the sum of two hundred and twenty-five dollars (\$225).

Now, on motion of David A. Thompson, attorney for said corporation petitioner, it is

Ordered, that the Evangelical Lutheran Church of the Redeemer, of Albany, N. Y., a religious corporation, is hereby authorized to sell the real property described in the petition to Henry C. Hewig and Mary Hewig, his wife, for the sum of two hundred and twenty-five dollars (\$225), subject to the conditions in said petition mentioned, and the trustees of said corporation are further directed to dispose of the proceeds of said sale by applying the same for the general expenses of the corporation and for addition to the building fund.

The following is a description of the property hereby authorized to be sold.
(Insert description.)

GEORGE ADDINGTON,
Albany County Judge.

Deed with Recitals.

This indenture, made this 16th day of November, in the year 1910, between the North Baptist Church and Congregation of the city of Troy, a religious corporation duly incorporated under and by virtue of the laws of the State of New York, located in the city of Troy, Rensselaer county, New York, party of the first part, and Edward H. Lisk, of the same place, party of the second part.

Whereas, the party of the first part, at a meeting of its qualified members, held at their meeting-house in the city of Troy, N. Y., pursuant to a public notice given at one regular service of the church at each of the two Sundays next preceding said meeting, the object, time, and place of such meeting being distinctly stated in said notice, the members of said party of the first part duly consented to the sale of the real estate hereinafter described, and duly authorized and directed its trustees to make application to the court to sell the same; and, whereas, the said trustees have authorized a sale of said real estate by a vote of at least two-thirds of its trustees, at a meeting thereof,

duly called and held; and, whereas, upon the petition of said trustees pursuant to such authorization, an order of the Supreme Court was duly made permitting the party of the first part to sell said real estate.

Now this indenture witnesseth: That the said party of the first part, pursuant to the provisions of said order, and in consideration of the sum of seventy-five hundred dollars (\$7,500), lawful money of the United States, paid by the part of the second part, does hereby grant and release unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land: (Description.) This conveyance is made subject to a mortgage for five thousand dollars (\$5,000), with the interest due and to grow due thereon, covering the premises herein described, made and executed by the North Baptist Church and Congregation of the city of Troy to the Hudson River Baptist Association North, dated the 14th day of November, 1910, and recorded in Rensselaer county clerk's office on the 15th day of November, 1910, which mortgage and the bond to secure which said mortgage was given, the said party of the second part hereby assumes and agrees to pay as part of the consideration and purchase price of the premises above described, and the said party of the second part also assumes and agrees to pay the State and county taxes levied or to be levied on said premises for the year 1910, together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever, subject to the mortgage for five thousand dollars (\$5,000), with the interest due and to grow due thereon, and the State and county taxes for the year 1910, above mentioned.

In witness whereof, the said The North Baptist Church and Congregation of the city of Troy has caused these presents to be signed, sealed, executed, acknowledged, and delivered in its name and behalf by Otis G. Clark, its president.

In presence of
WM. C. GORDON,

THE NORTH BAPTIST CHURCH AND CONGREGATION OF THE CITY OF TROY.

By OTIS G. CLARK, *as President*. [L. S.]

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:
City of Troy, }

On this 16th day of November, 1910, before me personally came Otis G. Clarke, to me known, who being by me duly sworn did depose and say that he resided in the city of Troy, Rensselaer county, New York; that he is the president of the North Baptist Church and Congregation of the city of Troy, the corporation described in and which executed the above instrument; that the said corporation has no corporate seal, and that he signed his name thereto by order of the board of trustees of said corporation.

WM. C. GORDON,
Com. of Deeds, Troy, N. Y.

Petition for Leave to Mortgage.

To the Supreme Court of the State of New York:

The petition of the North Baptist Church and Congregation of the city of Troy, N. Y., respectfully shows:

First. That the petitioner is a religious corporation, and that its corporate name is the "North Baptist Church and Congregation of the City of Troy." That it is managed by trustees. That the whole number of its trustees is nine. That the names of the trustees and their places of residence respectively are as follows: (Insert names.)

That the names of its principal officers and their places of residence are as follows: (Insert names.)

Second. That the business of the petitioner, and the object of its incorporation, is to enable its members to meet for divine worship and other religious observances, and the establishment and maintenance of a church for the furtherance of such objects, and that it was incorporated under and pursuant to an act of the Legislature of the State of New York, entitled "An Act to Provide for the Incorporation of Religious Societies, passed April 5, 1813." That its location and legal residence is in the city of Troy, New York.

Third. That the petitioner is the owner of certain real property, a description of which by metes and bounds is as follows: (Description.)

Fourth. That the interest of the corporation will be promoted by the mortgaging of the real property above specified, and that a concise statement of the reasons therefor is as follows: The corporation is indebted in the sum of five thousand dollars (\$5,000), that the corporation has no money or other resources outside of the real estate above described and the real estate on which its church building stands, and the chattels and personal property which constitute the furniture and furnishing of its said church building, with which to pay said indebtedness, and it is necessary that the payment of said indebtedness should be provided for by the giving of a mortgage as a security for the loan of that amount, thereby extending the time of payment sufficiently to enable said corporation to acquire means to pay and cancel said indebtedness without sacrificing its property interests.

Fifth. That said mortgage has been authorized by a vote of at least two-thirds of the trustees of the petitioner, at a meeting thereof duly called and held, and a copy of the resolution granting such authority is made a part hereof, and reads as follows:

"Whereas, the members of the North Baptist Church and Congregation of the city of Troy, N. Y., have authorized and consented that the trustees of said corporation mortgage the following described property of said corporation, viz.: (description), for a sum not to exceed five thousand dollars (\$5,000), that being the amount required to pay debts incurred in the administration of the temporal affairs of said corporation; and, whereas, said corporation is indebted in the sum of five thousand dollars (\$5,000), and whereas the Hudson River Baptist Association North has agreed to accept a mortgage on the aforesaid property as security for the loan of five thousand dollars (\$5,000), and the bond of said corporation, said bond and mortgage to contain the provisions and conditions hereinafter set forth.

"Resolved, at least two-thirds of said trustees being present and voting unanimously for this resolution, that the trustees of the North Baptist Church and Congregation of the city of Troy authorize, and they do hereby authorize the making of a mortgage upon and covering the real estate hereinbefore described and the delivery thereof to the Hudson River Baptist Association North, for the sum of five thousand dollars (\$5,000), and the making and delivery of a bond to accompany said mortgage; that said bond be drawn to bind said corporation in the penal sum of ten thousand dollars (\$10,000), and both said bond and mortgage to be conditioned for the payment of the sum of five thousand dollars (\$5,000), to the said Hudson River Baptist Association North, their successors or assigns, at the expiration of five (5) years from the date of the making and delivery thereon, with interest thereon at the rate of five per cent. (5%) per annum payable semi-annually, which bond and mortgage shall also contain the usual interest, insurance, taxes, and assessment clauses, the said corporation to have the privilege of paying on account of said principal sum on any semi-annual interest day any sum not less than five hundred dollars (\$500), and that Otis G. Clarke, the president of the

board of trustees, be authorized to make and execute said bond and mortgage and deliver the same to the Hudson River Baptist Association North, on behalf of this corporation and its trustees."

Sixth. That the market value of the remaining real property of the petitioner is twenty-five thousand dollars (\$25,000). That outside of the furniture in its church building, which stands upon such remaining real property, the petitioner has no personal property. That the cash value of said furniture is twenty-five hundred dollars (\$2,500). That the total amount of the debts and liabilities of the petitioner is five thousand dollars (\$5,000), and the same is unsecured.

Seventh. That the application proposed to be made of the moneys realized from such mortgage is as follows: to provide for the payment of said indebtedness of five thousand dollars (\$5,000).

Eighth. That at a meeting of the qualified members of the petitioner held at their meeting-house in the city of Troy, N. Y., on the 8th day of February, 1910, pursuant to a public notice given at one regular service of the church on each of the two Sundays next preceding said meeting, the object, time, and place of such meeting being distinctly stated in said notice, the members of said corporation duly consented to the mortgaging of the property of said corporation, and duly authorized and directed the trustees of the petitioner to mortgage its real estate by a resolution unanimously passed at said meeting. That a copy of the resolution evidencing such consent thereto and direction is made a part hereof and reads as follows:

"*Resolved*, that the board of trustees of the North Baptist Church be authorized and empowered to raise either by giving a mortgage or by note of trustees a sum not to exceed five thousand dollars (\$5,000), the above amount being required to pay debts incurred in the administration of the temporal affairs of the church."

WHEREFORE, the petitioner demands that an order may be made granting leave to the said corporation to mortgage the real estate hereinbefore described for the sum of five thousand dollars (\$5,000), and authorizing and empowering said corporation to execute and deliver a bond and mortgage executed in the name of said petitioner to the Hudson River Baptist Association North, upon the real estate hereinbefore described, for that purpose, which bond and mortgage shall contain all the conditions and provisions hereinbefore set forth in the resolution of the trustees, a copy of which appears in this petition.

Dated, Troy, N. Y.

(Signatures and verifications.)

Order for Leave to Mortgage.

(Caption and title.)

Upon reading and filing the petition of the North Baptist Church and Congregation of the city of Troy, for leave to mortgage certain of its real estate, which petition was dated, duly verified and signed on this 14th day of November, 1910, by Otis G. Clarke, Don C. Woodcock, James A. Dorrance, William F. Gurley, Philander Pollock, Halbert D. Hull, William A. Sherman, Stephen D. Sweet, and Edward W. Douglas, comprising the whole number of the trustees of the petitioning corporation, from which petition it satisfactorily appears that the members of the corporation have duly consented to the mortgaging of its real estate, and that such mortgage has been authorized by a vote of at least two-thirds of the trustees of the corporation at a meeting thereof duly called and held, and that the interest of the corporation will be promoted by the mortgaging of the real property specified in the petition, and that said petition complies with the provisions required by law relating to the application to mortgage the real estate of a corporation.

Now, after due deliberation upon the matters set forth in said petition,

and after hearing Edward W. Douglas, of counsel for the petitioning corporation, and upon his motion, it is

Ordered, that the prayer of said petitioner be granted, and that the petitioner be and it hereby is given leave to mortgage the real estate described in said petition for the sum of five thousand dollars (\$5,000), and it is further

Ordered, that the petitioner execute, duly acknowledge, and deliver to the Hudson River Baptist Association North, the corporation named in said petition, a bond and mortgage, which mortgage shall cover the real estate owned by said corporation described in the petition, the petitioner to be bound in said bond in the sum of ten thousand dollars (\$10,000), and both said bond and mortgage to be conditioned for the payment of the sum of five thousand dollars to the said The Hudson River Baptist Association North, their successors or assigns, at the expiration of five (5) years from the date of said bond and mortgage, with interest thereon at the rate of five per cent. (5%) per annum, payable semi-annually, with the usual interest, insurance, tax, and assessment clauses therein, the petitioner to have the privilege of paying on account of said principal sum on any semi-annual interest day, any sum not less than five hundred dollars (\$500); and it is further

Ordered, that the proceeds of said bond and mortgage shall be applied for the purposes mentioned in the petition.

Enter in Rensselaer county.

CORPORATIONS, RECEIVERS OF,

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- II. WHEN AND IN WHAT MANNER RECEIVER APPOINTED.** §§ 106, 182, 191, 306, 312, 315, 932.
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- III. SECURITY TO BE GIVEN AND OATH TAKEN BY RECEIVER.** §§ 225, 226, 234, 238, 934.
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- IV. RECEIVER'S TITLE TO CORPORATE PROPERTY.** §§ 231–233, 936.
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- V. AUTHORITY OF ONE OR MORE RECEIVERS AND OF SURVIVOR.** §§ 235, 236, 237, 940.
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- VI. POWERS OF RECEIVERS OF CORPORATIONS.** §§ 239, 240, 241, 242, 243, 244, 256, 257, 258, 259, 268, Rule 81, 941.
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The following sections of the Code have been transferred wholly or in part to the Consolidated Statutes, General Corporation Law.

Code.	Gen. Corp. Law.	Code.	Gen. Corp. Law.
Sec. 715 (in part)	To Sec. 225	Sec. 1810	To Sec. 306
715 (in part)	226	2423	182
715 (in part)	227	2429	191
716 (in part)	243	2431-a	277
1788	106	2431-b	268

The major portion of the provisions of the law relative to receivers is derived from the Revised Statutes.

Precedents relating to temporary and permanent receivers are given under "Corporations, Proceedings for Voluntary Dissolution of."

The appointment, control, and discharge of receivers in dissolution of corporations are so closely related to the procedure therein that it is found more convenient to group the precedents under that title.

ARTICLE I.

STATUTORY PROVISIONS AS TO RECEIVERS GENERALLY CONSIDERED. § 230.

§ 230. Application of this article.

Unless otherwise provided the provisions of this article (Art. 11, General Corporation Law) shall apply only to permanent receivers appointed pursuant to section one hundred and six or section one hundred and ninety-one of this chapter.

Consolidators' note to section 230. This section is new. It makes the provisions of this article applicable to receivers appointed under sections 107 and 191 of this chapter. This merely carries out the present law. Section 107 of this chapter was formerly a part of section 1788 of the Code of Civil Procedure which provided that a permanent receiver should have all the powers, duties, and liabilities imposed upon a receiver appointed in proceedings for the voluntary dissolution of a corporation.

The reference to section 107 in above note is evidently intended to be to section 106 of the General Corporation Law.

The condition of the statutes as to receivers of corporations existing previous to the consolidation of 1909 is stated in a previous edition of this work as follows:

"It will be noticed that the confusion with reference to the rights, powers, and duties of receivers is almost inextricable, in that a portion of the Revised Statutes are applicable to receivers under voluntary dissolution and also to other portions of the Code. By reason of this confusion, much difficulty arises as to the citation of authorities with reference to the rights, powers, and duties of receivers, as it is exceedingly difficult to determine to what extent decisions made with regard to the powers of receivers appointed under other statutes are applicable to receivers under voluntary dissolution."

It may, of course, under the provisions of section 230, be assumed that the decisions made under statutes therein referred to are applicable to this class of cases, but each case must be carefully examined in order to determine its relation to the general rule relative to receivers.

Reference is made to the same subject at page 180, Special Actions (3d ed.), where it is said:

"In the present statutes there is no well-defined or well-regulated system of practice upon the subject, and it is frequently difficult to determine the correct procedure to be adopted in such cases. The Code of Civil Procedure, as a general rule, provides for the cases in which a receiver may be appointed, but its provisions are found under many different heads, and do not include all the cases in which the appointment may be made, especially where there has been legislation subsequent to its adoption."

In the Special Proceedings the subject was necessarily considered as relating to the proceeding for "a voluntary dissolution of a corporation" under section 2419, etc., of the Code. In the Special Actions in connection with the action to dissolve and annul a corporation under section 1784 *et seq.* In the "Actions" the Code statutes on the subject as they then stood are collated, together with the authorities relative to the appointment, powers, and duties of such receivers. The consolidation of 1909 renders necessary a reconsideration and rearrangement of the entire subject, since the consolidators have carried the provisions of both the Code and statutes into the General Corporation Law. While this consolidation has somewhat simplified the matter, it is very far from entirely relieving the crudities of the statutes owing to the fact that the consolidators had no authority to revise, but were obliged to consolidate the statutory provisions and in so doing necessarily retained many inconvenient and troublesome provisions. They were prevented from adding such as would

have served to clarify the subject, more especially as the language of some of the provisions of the former statutes was vague and indefinite, and the consolidators evidently were unwilling to take the responsibility of deciding as to whether they were obsolete. Hence many provisions are repeated in the consolidation while others refer to sections contained in other articles of the chapter, the reference frequently being somewhat obscure. The result is that it is still difficult to collate the different provisions in a satisfactory manner since some relate to voluntary dissolution and others to dissolution by action, and many sections on the subject refer to both methods.

To illustrate: The powers of a temporary receiver in voluntary dissolution are defined under the provisions relative to dissolution by action, under article 6. The powers of a permanent receiver so appointed are regulated by article 11; in addition article 10a is applicable to both.

Powers and duties are conferred upon receivers temporary and permanent by sections 104, 105, 106, 107, 182, 191, which appear to be common to the action to dissolve and the special proceedings for that purpose, but in addition article 11 is devoted to "Powers, Duties, and Liabilities of Receivers," and its opening section states that unless otherwise provided, the article relates only to receivers appointed under sections 106 and 191, viz.: Receivers appointed in voluntary proceedings or in an action for dissolution.

By article 12 entitled "Provisions applicable to two or more of the foregoing proceedings or actions," some of its sections are made applicable to receivers appointed in actions only, others to those appointed in both actions and special proceedings; and it requires in many instances very careful examination to ascertain the extent of their application.

Note to article 12 states that "This article contains without change the provisions in chapter 15, title 2, article 5 of the Code of Civil Procedure entitled 'Provisions applicable to two or more of the actions specified in this title,' and in addition to the provisions of the Code of Civil Procedure certain other statutory provisions of too general a nature to be inserted under any of the preceding articles."

The following note of the consolidators throws some light on the subject:

Article XI. This article relates to the powers, duties and liabilities of receivers of corporations and unless otherwise provided in specific sections it is made applicable to receivers appointed under article 6 relating to actions for sequestration, actions for dissolution and actions to enforce the individual liability of officers and members of corporations and article 9 relating to proceedings for the voluntary dissolution of a corporation. The article consists of the live matter in sections 66-89 of the Revised Statutes (part 3, chap. 8, tit. 4, art. 3), the sections of the Revised Statutes relating to the powers, duties and obligations of trustees of insolvent debtors (part 2, chap. 5, tit. 1, art. 8) which are made applicable by reference in sections 66 to 89 above referred to, provisions from the Code of Civil Procedure and finally provisions from independent

statutes not found in the Revised Statutes or the Code of Civil Procedure relating to the subject of receivers. The provisions of the Revised Statutes were made applicable by the Laws of 1880, chapter 245, section 1, subdivision 3, page 368. Section 42 of the Revised Statutes being made applicable to permanent receivers appointed in actions for sequestration, actions for dissolution, etc., under section 1788 of the Code of Civil Procedure and sections 66 to 89, both inclusive, being made applicable to receivers appointed in proceedings for the voluntary dissolution of a corporation under section 2429 of the Code of Civil Procedure. The provisions of the Code of Civil Procedure relating to receivers and of independent statutes have been incorporated according to their context and judicial construction making them applicable. For convenience, the provisions relating to the powers, duties and liabilities of receivers of corporations have been placed in a separate article where by reference they have been made applicable to such actions and proceedings as they are now applicable to by law.

The fact that the statutory provisions relative to receivers appointed in proceedings for dissolution of a corporation by action are also applicable to proceedings for the voluntary dissolution renders it necessary either to duplicate many of the citations in the Special Actions under "Corporations and Receivers of Corporations" in treating of the rights, powers and duties of receivers, appointed in actions or to refer to that work. It has been deemed more convenient to repeat some of the citations here; *first*, because reference to that work may not be readily had; *second*, by reason of the change in the statutes by their consolidation, the authorities can be arranged to better advantage by following the Consolidated Statutes by which the various statutes found in the Special Actions, pages 59 to 286, are consolidated in the General Corporation Law with the exception of some of the Code provisions which still retain their place.

ARTICLE II.

WHEN AND IN WHAT MANNER RECEIVER APPOINTED. §§ 106, 182, 191, 306, 312, 315.

§ 106. *Permanent receiver, 932.*

§ 182. *Temporary receiver, 933.*

§ 191. *Permanent receiver, 933.*

§ 306. *Appointment of receivers of property of corporation, 933.*

§ 312. *Service of papers upon Attorney-General, 933.*

§ 315. *County wherein action may be brought by Attorney-General on behalf of the people, 933.*

§ 106 (Formerly Code, § 1810). Appointment of receivers of property of corporations.

A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in articles fifth, sixth, or seventh of this chapter.

2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

§ 182 (Formerly Code, § 2423). Temporary receiver.

If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one-hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

§ 306 (Formerly Code, § 1788). Permanent receiver.

A receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers, and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver in article eleven of this chapter. (Thus amended by L. 1909, chap. 240, § 33, in effect April 22, 1909.)

§ 191 (Formerly Code, § 2429). Permanent receiver.

Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in section one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. Upon the entry of the order the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter. (Thus amended by L. 1909, chap. 240, § 39, in effect April 22, 1909.)

§ 315. County wherein action may be brought by attorney-general on behalf of the people.

An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

Consolidators' note to section 315. This provision of the statute of 1883 has been incorporated in this article because it relates to actions or proceedings brought by the attorney-general "against any corporation for the purpose of procuring its dissolution, the appointment of a receiver or the sequestration of its property."

§ 312. Service of papers upon attorney-general.

A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon

to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation, shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

Consolidators' note to section 312. The provisions of this section apply not only to actions brought by the attorney-general but to proceedings for the voluntary dissolution of a corporation. Hence its insertion in this general article.

That section 8 of chapter 378 of the Laws of 1883, entitled "An action in relation to receivers of corporations," requiring that a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, in every action for the dissolution of a corporation, shall, in all cases, be served on the attorney-general, applies to proceedings for the voluntary dissolution of corporations, and the court has no jurisdiction to entertain such proceedings unless a service of such notice is made or waived," *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 175, 5 Supp. 136.

"*Held*, that the action brought to sequester the property of the company, in which Henry was appointed receiver, was an action for a "distribution of its assets," within the meaning of section 8 of chapter 378 of 1883, requiring copies of all notices and all motion papers in every such action to be served upon the attorney-general." *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 165.

Other citations under this section are: *Dohn v. Buffalo Amusement Co.*, 66 App. Div. 446; *Nealis v. American Tube & Iron Co.*, 76 Hun, 220; *Matter of Stonebridge*, 57 Hun, 441; *People v. American Steam Boiler Ins. Co.*, 3 App. Div. 504, 38 Supp. 406.

ARTICLE III.

SECURITY TO BE GIVEN AND OATH TAKEN BY RECEIVER, §§ 225, 226, 234, 238.

§ 225. *Security*, 934.

§ 226. *Removal or new bond*, 934.

§ 234. *Security of receiver*, 935.

§ 238. *Oath of receiver*, 935.

§ 225 (Formerly Code, § 715, in part). Security.

A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same. (Added by L. 1909, chap. 240, § 40, in effect April 22, 1909.)

§ 226 (Formerly Code, § 715, in part). Removal or new bond.

The court, or where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply

to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Added by L. 1909, chap. 240, § 40, in effect April 22, 1909.)

§ 234. Security of receiver.

Before entering upon the duties of their appointment, such receivers shall give such security to the people of the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

Consolidators' note to section 234. The provisions of section 715 of the Code of Civil Procedure have not been inserted in this article for the reason that the section provides that they shall not apply to "a case where special provision is made by law for the security to be given by a receiver." This treatment of the matter does not affect the provisions in section 715 of the Code of Civil Procedure relating to bonds of fidelity or surety companies. See *Jones v. Blum*, 145 N. Y. 338, and *Nealis v. American Tube & Iron Co.*, 76 Hun, 223.

§ 238. Oath of receiver.

Before proceeding to the discharge of any of their duties, all such receivers shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed them.

A receiver required by law to give bond as such, may include, as a part of his necessary expenses, such reasonable sum not exceeding 1 per cent. per annum upon the amount of such bond paid the surety thereon as the court or judge allows. *Code*, § 3320.

Section 1788 of the Code of Civil Procedure in regard to temporary receivers, requiring them to qualify as prescribed by law for the qualification of permanent receivers, applies only to those things which a receiver must do in order to qualify him to act as such receiver and not to his proceedings after his qualification. *Nealis v. American Tube & Iron Co.*, 76 Hun, 220, 27 Supp. 733; *aff'd*, 150 N. Y. 42.

When a receiver's accounts have been passed upon by the court an action will not lie upon his bond if viewed simply as a statutory obligation, unless it appears that the surety was given notice of such accounting, as is required by section 715 of the Code of Civil Procedure. *Stratton v. City Trust, Safe Deposit & S. Co.*, 86 App. Div. 551, 83 Supp. 780.

An action is not maintainable upon a receiver's bond, until proceedings for an accounting are had against him, or in case of his death without having rendered an account, until such proceedings are had against his personal representatives; at least where no reason appears why such an accounting could not be had. This rule is not qualified by the fact that the bond contains no provision for a report or accounting by the receiver. *French v. Dauchy et al.*, 134 N. Y. 543.

The extent of the liability of a surety can be determined only by the terms of the bond, and he will not be held bound by the adjudication against his principal unless it is so provided for by the terms of the bond. *Thompson v. MacGregor*, 81 N. Y. 592.

Where a temporary receiver, appointed in an action to sequester the

property of the corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be executed in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. *Jones v. Blum*, 145 N. Y. 333, 64 St. Rep. 806.

The liabilities of the sureties of a receiver differ from those of an administrator, being usually limited to an undertaking that he will faithfully discharge the duties of his trust, and a judgment against him in his official capacity is not conclusive upon his sureties unless there has been an accounting of the trust fund and the remedies against the receiver have been exhausted. *Coe v. Patterson*, 122 App. Div. 77, 106 Supp. 659, rev'g 53 Misc. 412.

ARTICLE IV.

RECEIVER'S TITLE TO CORPORATE PROPERTY. §§ 231-233.

§ 231. *Receiver trustee of property*, 936.

§ 232. *Receiver's title to property*, 936.

§ 233. *Transfer of assets of corporation to receiver*, 937.

§ 231. Receiver trustee of property.

Permanent receivers shall be trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

Consolidators' note to section 231. This section covers the same ground as the following provision in Revised Statutes which latter provision therefore has been omitted:

All assignees and trustees, appointed under any authority, conferred by any of the provisions of the preceding articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared, in respect to trustees. (R. S., pt. 2, chap 5, tit. 1, art. 8, section 1.)

The receiver of a voluntary dissolved corporation is, by force of the statute, a trustee of the property of the corporation for the benefit of all its creditors; and the six years' Statute of Limitations does not run in his favor against claims not barred at the time of his appointment, so long as the trust is open and continuing, and has not been repudiated or denied. *Ludington v. Thompson* 153 N. Y. 499. See *Matter of Coleman*, 174 N. Y. 383.

§ 232. Receiver's title to property.

Such receivers shall be vested with all the property, real and personal, of the corporation, from the time of their having filed the security required by law. (Thus amended by L. 1909, chap 240, § 41, in effect April 22, 1909.)

Consolidators' note to section 232. This section relates to the same subject as the following provision of the Revised Statutes which is not applicable and therefore has been omitted: "The trustees taking such oath, shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles), as follows:

1. In proceedings under the first article of this title, from the first publication of the notice to the non-resident, absconding or concealed debtor;
2. In proceedings under the second article, from the appointment of trustees;
3. In proceedings under the third, fifth and sixth articles, from the execution of the assignment, in these articles directed;

4. In proceedings under the fourth article, when the assignment was voluntary, from the time of its execution; when executed by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors." (R. S., pt. 2, chap 5, tit. 1, art 8, § 6.)

§ 233. Transfer of assets of corporation to receiver.

In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general, all property, real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

The title of the receiver does not vest till his bond is filed, and a creditor may obtain a lien by judgment or attachment between the appointment and filing of the bond. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557. See *Matter of Eagle Iron Works*, 8 Paige, 385; *Matter of Berry*, 26 Barb. 55.

A receiver of an insolvent national bank acquires no title to property in the custody of the bank which it does not own, as against the owner. *Corn Exchange Bank v. Blye*, 101 N. Y. 303. No formal conveyance is necessary to a receiver "of all the assets and credits" of an insurance company; he becomes vested with the title on his appointment. *Attorney-General v. Mutual Life Ins. Co.*, 100 N. Y. 279.

Upon the appointment of a receiver of a corporation, the right to the possession of all the corporate property vests in him as well as the title to property which remained in the corporation, although it may have created a trust concerning it. *Matter of Home Provident Safety Fund Assoc.*, 39 St. Rep. 437, 15 Supp. 211.

The court may sequester the property and effects of a corporation and appoint a receiver, who, upon his appointment, and the giving of security becomes vested with all its estate, real and personal, in trust for the benefit of creditors and stockholders. *Rinn v. Astor Fire Ins. Co.*, 59 N. Y. 143.

The title of a general assignee of an insolvent corporation to its property, which he had reduced to possession before the commencement of the action to dissolve the corporation, is *prima facie* superior to that of the permanent receiver subsequently appointed in such an action. If the receiver wishes to try the title of the general assignee, he must proceed by action and not by motion to punish the assignee as for a contempt in refusing to surrender the property on demand. *People of the State of New York v. U. S. Law Blank & Stationery Co.*, 24 Misc. 535, 53 Supp. 852.

He has no title personally, but his possession is that of the court, and as receiver he represents a separate and independent legal existence, and an order made in an action brought against him personally and not as

receiver and not in any way purporting to affect him in his official character, has no force or bearing upon him as receiver. *Eddy v. Co-op. Dress Assoc.*, 3 Civ. Pro. 442.

It is not a general rule that a receiver can only take title from an insolvent person or corporation by a formal conveyance. The general rule is otherwise, as in the case of receivers appointed in supplementary proceedings, and receivers and assignees appointed in bankrupt proceedings, and in nearly all cases of the appointment of receivers of insolvent corporations. The title of receivers in such cases to real and personal property, both in this country and in England, is generally statutory, and not under any formal conveyance. *Matter of Attorney-General v. Atl. Mut. L. Ins. Co.*, 100 N. Y. 279 (283).

Even though it is immaterial for general purposes at what time the order of appointment of receiver is entered, because their title relates back to the time at which the order was signed, it does not relate back so as to defeat intervening rights of a person actually acquired before the perfection of the order. *Wilcox v. National Shoe & Leather Co.*, 67 App. Div. 466, citing *Moran v. Sturges*, 144 U. S. 256.

Although when a receiver files his bond his title relates back to the time of his appointment, still it does not relate back for the purpose of destroying vested rights or for any other unjust purpose. *Matter of Lewis & Fowler Mfg. Co.*, 89 Hun, 209, 34 Supp. 983.

A receiver takes title to the property of a corporation as it exists at the time of his appointment. That is, subject to the lien of any valid levy or other lien upon it. From the moment of his appointment he becomes an officer of the court and from that time the property is in the custody of the law and the court has not only the power but it is its duty to protect the rights of those interested in it. The appointment of receiver cannot work the destruction of vested rights. *Gorman v. Finn*, 56 App. Div. 155 (158), 67 Supp. 546; aff'd, 171 N. Y. 629.

While the court has power, in proceedings for the voluntary dissolution of a corporation, to decree a distribution of its funds among those entitled thereto, it may not take from a trustee funds placed in his hands by the corporation for a specific purpose, pursuant to a contract obligation, and itself distribute them through its receiver instead of through the trustee; the latter is, notwithstanding the dissolution, entitled to the possession of the trust fund, and the authority of the court is limited to compelling the trustee to distribute the fund, as provided for by the contract, and under the supervision and orders of the court. *Matter of H. P. S. F. Assoc.*, 129 N. Y. 288.

Where an execution, issued upon a valid judgment against a corporation, is delivered to the sheriff of the proper county upon the same day as, but prior to, the filing of an order appointing a temporary receiver of the

property of the corporation, the execution, being prior in time, is entitled to priority over the title acquired by the receiver. *Matter of Gies Lithographic Co.*, 7 App. Div. 550, 40 Supp. 146.

In a voluntary dissolution proceeding, the receiver of a corporation is vested with title to the assets of the corporation upon the making of the order appointing him, and no superior lien is obtained by the levy of an attachment thereon between the making of such order and the taking of possession by the receiver.

The purchasers under such a receiver's sale get full title, and the sheriff may not maintain against them an action for conversion for taking the property so levied upon. *Dickey v. Bates*, 13 Misc. 489, 35 Supp. 525.

A sale of property made under an execution without leave of the court, while the property is in the possession of a receiver, is illegal and void, although the levy was made before the appointment of the receiver.

The lien of the execution is not destroyed by the appointment of the receiver, but the rights and interest of all parties in the property are thereafter to be adjusted by the court making the appointment, and it cannot be taken out of the possession of the receiver and sold under the execution without leave of the court.

Where a receiver, duly appointed in an action, in pursuance of the directions of a judgment regularly obtained therein, sells property in his possession, as such receiver, he is not a trespasser, but is protected by the judgment, as are also all persons aiding and assisting him. *Walling v. Miller*, 108 N. Y. 173.

Where a sheriff had seized property, the sale by him, after the appointment of a receiver and while the property was in his possession, and not in the possession of the receiver, was not absolutely void and could at most be held to be irregular. *Barnum v. Hart*, 119 N. Y. 101.

This case is distinguished from *Walling v. Miller*, 108 N. Y. 173, *supra*, upon the ground that there the property was sold by the sheriff after the title had passed to the receiver, and while it was in his possession.

Walling v. Miller, *supra*, is again distinguished in *Moore v. Potter*, 155 N. Y. 481, at 489, where it is held in that case that the title to property which a receiver refuses to accept and pay for under a contract does not pass to the receiver so as to preclude the vendor from making a resale of the property without leave of the court in order to ascertain the amount of his loss by breach of the contract.

Where certain work was done, the employers agreeing that the employed should have a general lien upon the property, and a receiver was appointed for the employers, it was held that the lien should not be foreclosed, but the rights of the parties should be determined under the receivership. *Matter of Herbst*, 63 Hun, 247, 44 St. Rep. 173, 17 Supp. 760. A person having a judgment against a receiver, with the direction

that the claim be paid out of a certain fund, cannot be deprived of his rights by a judgment in another action to which he was not a party, discharging the receiver. *Woodruff v. Jewett*, 115 N. Y. 267, 26 St. Rep. 142, rev'g 37 Hun, 205. In the absence of proof that the attaching creditor has obtained a lien upon sufficient assets to pay his judgment, the receiver of the debtor will not be directed to pay the judgment out of the assets in his hands. *Glines v. Supreme Sitting Order of the Iron Hall*, 50 St. Rep. 743, 21 Supp. 736.

Where merchants sent their bookkeeper to a bank with a letter inquiring as to its solvency, and directing a deposit if the answer was favorable, and the money was deposited, and two hours later the bank failed, a summary order asking the receiver of the bank to repay the money was held to be improper, and the party was remanded to his action. *Matter of North River Bank*, 60 Hun, 91, 37 St. Rep. 931, 14 Supp. 261.

Every lien upon the property of a corporation resting upon valid agreement or process before the appointment of a receiver or lienor, being lawfully in possession, must be preserved with the right of enforcement unless courts and Legislatures are to override the vested rights of creditors. This principle has been repeatedly recognized and approved in the Court of Appeals. *Matter of Binghamton Gen. Elec. Co.*, 143 N. Y. 261.

The beneficiary of a benefit society, whose claim had been proved, attached its bank balance in New York, after a temporary receiver had been appointed by the court of Indiana, under the law of which it was organized, but before a receiver of the assets in New York had been appointed; *held*, that the attachment had priority over the rights of the receivers, and that the funds were not impressed with a trust in favor of those entitled to share in the relief fund of the society. *National Park Bk. v. Clark*, 92 App. Div. 262, 87 Supp. 185; *dist'g Popper v. Supreme Council, Order of Chosen Friends*, 61 App. Div. 405; *Hallenborg v. Greene*, 66 App. Div. 590.

ARTICLE V.

AUTHORITY OF ONE OR MORE RECEIVERS AND OF SURVIVOR. §§ 235-237.

§ 235. *Authority of single receiver*, 940.

§ 236. *Authority where there is more than one receiver*, 940.

§ 237. *Surviving receivers*, 940.

§ 235. Authority of single receiver.

When one receiver only, shall be appointed, all the provisions herein contained, in reference to several receivers shall apply to him.

§ 236. Authority where there is more than one receiver.

When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them; and when there are more than two receivers appointed, every power and authority conferred on the receivers may be exercised by any two of them.

§ 237. Surviving receivers.

The survivor or survivors of any receivers shall have all the powers and rights given to receivers. All property in the hands of any receiver at the time of his death,

removal or incapacity, shall be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

One of the receivers of a corporation, who has authority from the other, may make a valid assignment of a claim belonging to the corporation. *Toplitz v. Kings Bridge Co.*, 20 Misc. 576, 46 Supp. 418.

ARTICLE VI.

POWERS OF RECEIVERS OF CORPORATION. §§ 239-244, 256-259, 268, Rule 81.

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§ 239. *General powers of receiver, 941.*

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Subd. 6. Ancillary receivers, 957.

Subd. 1. General Powers. § 239.

§ 239. General powers of receivers.

The said receivers shall have power:

1. To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due to such corporation in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such corporation before the appointment of the receiver of such corporation; notwithstanding the notice to creditors the receivers may sue for and recover, any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof;

2. To take into their hands, all the property of such corporation, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same;

3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the court having jurisdiction;

4. From time to time, to sell at public auction, all the property, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one;

5. To allow such credit on the sale of real property by them, as they shall deem reasonable, subject to the provisions of this article for not more than three-fourths of

the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

6. On such sales, to execute the necessary conveyances and bills of sale;

7. To redeem all mortgages and conditional contracts, and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

8. To settle all matters and accounts between such corporation and its debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

9. Under the order of the court appointing them, to compound with any person indebted to such corporation and thereupon to discharge all demands against such person.

Consolidators' note to section 239. This section comes from the chapter in the Revised Statutes relating to the powers, duties and liabilities of trustees of insolvent debtors (Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8). It was made applicable to receivers appointed in proceedings for the voluntary dissolution of a corporation by the following provision in the Revised Statutes relating to the voluntary dissolution of a corporation.

"Such receivers shall have all the powers and authority, conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made; pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 68. See *Matter of Coleman*, 174 N. Y. 383.

As to the application of Revised Statutes, pt. 2, chap. 5, see *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 382.

Subd. 1. Some of the provisions relating to trustees of insolvent debtors which were made applicable to receivers in proceedings for the voluntary dissolution of a corporation cannot be applied to such receivers. An illustration is found in the bracketed matter in this subdivision.

"The rights of the receiver become fixed at the time of his appointment; the rights of creditors of the bank represented by him then attached; and it would not be equitable to countenance any subsequent arrangement to give any one of them an undue preference over the others. Parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver, unless special equities exist." *Matter of Van Allen*, 37 Barb. 225 (231).

The Court of Appeals citing above case says in a unanimous decision in *Van Dyck v. McQuade*, 85 N. Y. 616 (617).

"If, under the authority derived from the statute, the receiver in this case had the power to allow a set-off, that power did not extend to a case where no mutual debts subsisted at the date of the appointment of the receiver."

Subd. 5. The words "not exceeding 18 months" have been bracketed out because a receiver is required to report within a year unless his time is extended. For the same reason the words "subject to the provisions of this article" have been inserted.

The following note from page 2053, *Birdseye's Cumming & Gilbert's Annotated Consolidated Laws*, clearly states the limitation of article 11 relative to permanent receivers:

"The article by its terms does not apply to a receiver appointed pursuant to section 306, in action brought under section 90 against officers for misconduct; a receiver appointed under sections 150, 151 to dissolve a moneyed corporation; a receiver appointed pursuant to section 306, in an action brought under section 131 to annul a corporation and vacate its charter; a receiver appointed pursuant to section 306, in an action to foreclose a corporate mortgage; a receiver appointed pursuant to section 306, in an action to preserve the assets; a receiver appointed pursuant to section 306, upon application of the regents, or a temporary receiver in any case. It applies to a permanent receiver in an action to sequester the property brought under section 100,

in an action to dissolve a corporation brought by the Attorney-General, a creditor or stockholder pursuant to sections 101, 102, and in a proceeding for voluntary dissolution under section 170ff. There seems to be some doubt as to whether the consolidators have not erred in failing to specifically apply the article to a receiver appointed pursuant to section 134 in an action by the people to vacate the charter or annul the existence of a corporation. That section provides that "the judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application."

A receiver not subject to this article is a common-law receiver, and, except as subject to special statutes, has the powers and duties of receivers at common law, as declared by courts of equity.

Section 115 of the General Corporation Law provides that receivers in dissolution proceedings shall be vested with all the estate, real and personal, of the corporation, and shall be trustees of such estate for the benefit of creditors of the corporation and of its stockholders. Section 116 of such law provides that such receiver shall have the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made. *Held*, that there is no statutory authority permitting a receiver, in an action brought by the people to dissolve a corporation on the ground of insolvency, to sell the real estate subject to certain liens, referred to in the final decree, and disregard others that are valid and existing. *Matter of Coleman*, 174 N. Y. 373, rev'g 77 App. Div. 496, 78 Supp. 1052.

A receiver represents the corporation, so that he has no other or higher equities than those possessed by the corporation. *Butterworth v. O'Brien*, 28 Barb. 187; *aff'd*, 23 N. Y. 275.

The receiver holds the property and estate of the corporation as the officer of the court, for the purpose of distribution, under the direction of the court, among creditors and stockholders, and in the absence of fraud or collusion the receiver and the creditors are bound by the action of the corporation. In case where a judgment has been entered against a corporation, it is the duty of the receiver, if any reason exists to question the judgment, to apply to the court rendering it to reopen it and be permitted to defend, otherwise he is bound by it. *Pringle v. Woolworth*, 90 N. Y. 502.

The situation of a receiver of an insolvent corporation is quite different from that of an assignee for the benefit of creditors, limited in his authority and power under the terms of the deed of assignment. The receiver is subject to the direction of the court that appointed him, and to the provisions of the statute regulating distribution of the assets of the insolvent corporation. He is a trustee of the insolvent estate for the benefit of the creditors and stockholders. *People v. St. Nicholas Bank*, 151 N. Y. 592.

The appointment of a receiver of a corporation by a court of equity at the instance of a creditor gives to the receiver only its temporary manage-

ment under the direction of the court, and is merely incidental to the principal relief sought; but the corporate existence continues. *People v. N. Y. City Ry. Co.*, 57 Misc. 114, 107 Supp. 247.

Primarily the receiver stands in the place of the corporation, placed there by the court in order to preserve its assets and property and to do with them as he may be directed. What rights the corporation possessed and might enforce against its directors and trustees the receiver possesses. *Mason v. Henry*, 152 N. Y. 529.

A receiver is an officer of the court appointing him and his possession is the possession of the court. The court will not permit his possession to be disturbed and will protect him from molestation in the discharge of his duties. *Attorney-General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.

The powers of a receiver are specified in section 1788; he is a mere custodian and manager of the property under the direction of the court during the pendency of the action. He has no power to appoint a deputy. *Murray v. Cantor*, 18 Misc. 389, 41 Supp. 652.

The receiver, as the representative of the corporation itself, possesses no greater rights than those which belong to the corporation. *Hyde v. Lynde*, 4 N. Y. 387. Where a receiver sought to have certain trust deeds given by a corporation at the time it was in embarrassed financial circumstances declared void, the receiver contended for their invalidity that they were made when insolvent or in contemplation of insolvency and with intent to give preference to particular creditors over other creditors, but it was held that such deeds were not void. *Curtis v. Leavitt*, 15 N. Y. 9.

Any legal preference which creditors may obtain without fraud or collusion on the part of the corporation cannot be attacked as invalid by a receiver subsequently appointed. *Varnum v. Hart*, 119 N. Y. 101. Where a receiver is not shown to represent any creditor having equity, he stands simply in the position of the company. *Billings v. Robinson*, 94 N. Y. 417; *Cutting v. Damerel*, 88 N. Y. 410; *Savage v. Medbury*, 19 N. Y. 32.

Creditors are only entitled, through a receiver, to the property, real and personal, things in action, contracts and effects of the corporation so far as they were owned by it at the time of his appointment, subject to any existing mortgage or lien. *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 165.

The receiver of an insolvent corporation represents both the creditors and stockholders, and may assert their rights when affected by the fraudulent or illegal acts of the corporation. *Gillett v. Moody*, 3 N. Y. 479. The receiver of a corporation is the immediate representative of the corporation. Taking as such the corporate title to its property and being subject to corporate disabilities, he has only the power over the property conferred upon him by statute. *Curtis v. Leavitt*, 15 N. Y. 9. The receiver may maintain an action against its stockholders to recover dividends

received by them while the corporation was insolvent (*Curtis v. Laytin*, 3 Keyes, 521); but he cannot impeach the lawful acts of the corporation. *Hyde v. Lynde*, 4 N. Y. 387. He is vested with all the property and effects of the corporation and has full power to sell and dispose of the same and settle its affairs. *Verplanck v. Merchants' Ins. Co.*, 2 Paige, 438; *White v. Haight*, 16 N. Y. 316. He may repudiate any illegally executed contract of the corporation and reclaim the property. *Tallmadge v. Pell*, 7 N. Y. 328. It is the duty of a receiver to so administer the assets that a fraudulent claim shall have no share in the distribution. *McParland v. Bain*, 26 Hun, 38. A receiver of a corporation occupies the position of a trustee for the corporate funds, for the benefit of persons interested therein. *Kimberly v. Stewart*, 22 How. 281; *McParland v. Bain*, 26 Hun, 38. He is vested with all the rights of action the company had when he was appointed, and he can sue for a tort committed before his appointment. *Gillett v. Fairchild*, 4 Denio, 80. But he cannot impeach or disaffirm the authorized acts of the corporation or its agents, and his appointment does not change the relation between the corporation and parties with whom it has been dealing. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. 605; *Williams v. Babcock*, 25 Barb. 109; *Bell v. Sibley*, 33 Barb. 610; *Savage v. Medbury*, 19 N. Y. 32; *Davenport v. Beardsley*, 23 Barb. 656. A receiver of an insolvent corporation may assign a chose in action due the corporation without using the corporate seal; he should act, contract, and convey in his own name. *Hoyt v. Thompson*, 5 N. Y. 320. He can enforce the common-law liability of a trustee of a savings bank for a misapplication of the funds. *Van Dyck v. McQuade*, 57 How. 62. He may discharge existing policies of insurance, but not reinsure. *In re Croton Ins. Co.*, 3 Barb. Ch. 642. He may apply for a warrant to bring up for examination any person who is indebted to the corporation, or who has property belonging to it in his custody. *Noble v. Halliday*, 1 N. Y. 330. He may continue a suit, brought by the insolvent corporation, in his own name or that of the original party. *Albany Ins. Co. v. Van Vranken*, 42 How. 281. He cannot, without consent of all parties interested, allow a claim which is not a charge on the trust fund, and he is bound to defend against an unjust claim. *Attorney-General v. Life & Fire Ins. Co.*, 4 Paige, 224. But he is not bound to disallow a just claim which is barred by the Statute of Limitations. *Sands v. Hill*, 42 Barb. 651.

The rights and duties of a receiver in this respect are formulated in *Gluck and Becker on Receivers*, page 236, in this language:

"The receiver, as an officer of the court, must act according to the latter's orders, and cannot himself determine the expediency of incurring any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. He has not the power, as incident to his general authority as re-

ceiver, to create liens on the property, or bind the trust estate by his contracts. The court alone has that power, and may clothe the receiver with authority to make all contracts necessary to the proper protection and use of the trust estate, but until it does clothe him with such power, any contracts made by him are not binding upon the estate or funds in his hands, and it is entirely within the discretion of the court whether it will ratify or disaffirm them." Citing among other authorities, *Vilas v. Page*, 106 N. Y. 439; *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352.

Receivers will not be bound by a waiver, expressed or implied, of a legal defense to an action, nor have they the right to abandon an equitable defense. *Attorney-General v. Life & Fire Ins. Co.*, 4 Paige, 224; *McEvers v. Lawrence*, Hoffman's Ch. 171.

If a judgment has been obtained against a corporation, a receiver may have it vacated if it was obtained fraudulently, collusively, or without consideration. *Whittlesy v. Delaney*, 73 N. Y. 571.

The receiver holds moneys which come into his hands subject to the order of the court, to be paid in the manner which the court shall direct, so that even if money has been paid to him by mistake in his official character as receiver, the court, of which he is an officer, can alone direct it to be refunded. *Duffy v. Casey*, 7 Rob. 79; *Betty v. Campbell*, 2 Rob. 664.

Where a receiver is directed to sell property subject to the order of the court, any transfer before such confirmation is without authority. The transfer is not void but voidable in case confirmation is denied, and in that case the transfer will not be operative. *Simmons v. Wood*, 45 How. 262; *Koontz v. Northern Bank*, 16 Wall. 196.

The receiver of an insolvent corporation who held the equity of redemption in mortgaged premises and purchased them under the foreclosure of the mortgage held by the corporation of which he is the receiver was held to retain them for the benefit of the *cestuis qui trust*, who may elect and adopt the purchase or demand a resale. This rule is entirely independent of the question whether in fact any fraud has intervened, but is upon the ground that one standing as trustee in respect to property is not permitted to purchase and hold it for his own benefit. *Jewett v. Miller*, 10 N. Y. 402.

A receiver of a corporation has no power to issue certificates which will be binding upon a trust estate unless authorized to do so by order of the court, and the holder of such certificates so issued without authority has no legal claim against the trust property in order to claim equitable relief; he must show the money represented therein was issued for the benefit of the estate. *Wesson v. Chapman*, 77 Hun, 144, 28 Supp. 431, 59 St. Rep. 44. Receivers' certificates do not bind parties who are not concluded by the judgment and proceedings in the action in which they were issued. *Stevens v. Union Trust Co.*, 57 Hun, 498, 11 Supp. 268.

In *Raht v. Attrill*, 106 N. Y. 423, receivers' certificates issued on an *ex parte* order were held not to create a lien in preference to the bondholder. Where the certificates were issued in payment of debts of the corporation, the court has no power to authorize a receiver to pay or issue certificates of indebtedness for the payment of labor and services in operating the road prior to his appointment, and to make certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley & Cuba R. R. Co.*, 103 N. Y. 245.

One of the purposes of a receiver of a railroad corporation is to manage and operate the property and maintain its integrity as a road and as a going business. *Townsend v. Oneonta, C. & R. S. R. R. Co.*, 88 App. Div. 208, 84 Supp. 427.

As to commercial paper, he does not stand in the position of an innocent, *bona fide* holder for value. *Briggs v. Merrill*, 58 Barb. 389. In *People v. Wall Street Bank*, 39 Hun, 525, it was held that the receiver of a bank had no authority to apply for the reduction of an assessment upon shares of capital stock of the bank on behalf of the stockholders, nor can the court direct the receiver to pay such an assessment.

The receiver of the property of a railroad company has no power incident to his general authority as such to create a lien on the property of the company, for the purchase of rolling stock. *Vilas v. Page*, 11 St. Rep. 416. A receiver appointed in an action to foreclose a mortgage given by a railroad corporation is not authorized to issue certificates to pay the claims of employees of the railroad for labor performed before his appointment. It has become the settled rule of the court that when it takes charge of a property through a receiver, the expenses of realization, and also expenses of preservation, may be incurred under the order of the court on the credit of the property and paid out of the income, or, when necessary, out of the *corpus* of the property before distribution. *Metropolitan, etc., Co. v. Tonawanda R. R. Co.*, 2 St. Rep. 69.

The receiver of a railroad, appointed in sequestration proceedings, must, under the Code of Civil Procedure, section 1788, take steps to "preserve" the property, and to that end has power to issue receiver's certificates to raise funds to complete the road. *Rochester Trust, etc., Co. v. Oneonta, etc., Ry. Co.*, 122 App. Div. 193, 107 Supp. 237.

A receiver cannot, without order of the court, grant a railroad company, other than that which he represents, permission to cross a railway of which he is receiver. *Howlett v. N. Y., West Shore & Buffalo R. R. Co.*, 14 Abb. N. C. 328; *aff'd*, 28 Hun, 55.

A receiver of a railroad company, appointed on application of judgment creditors, is not authorized to pay claims for work and materials furnished before his appointment. *Powers v. Jourdan*, 4 St. Rep. 839. Unless mutual debts exist at the time of the appointment of a receiver, he has no

authority to allow a set-off. *New Amsterdam Savings Bank v. Tartter*, 4 Abb. N. C. 215.

It seems that the receiver of an insurance company cannot, as against other creditors of the corporation, bind the estate in his hands by the admission of the validity of a claim, in fact not valid. *Insurance Co. of Pa. v. Telfair*, 45 App. Div. 564, 61 Supp. 322.

A temporary receiver of a railroad corporation has no power to pay a debt of the corporation incurred for supplies furnished before the foreclosure suit in which he was appointed was begun, where no authority to pay debts was given in the order appointing him, though he might be directed, on application therefor, to pay wages and current expenses essential to enable him to continue the operation of the road. *Mercantile Trust Co. v. Kings Co. El. Ry. Co.*, 40 App. Div. 141, 57 Supp. 892.

Where expenditures are necessary for repairs to property in the hands of a receiver of rents and profits, appointed in a foreclosure action, he has no power without order of the court to lessen the fund by expenditures for repairs. *Wyckoff v. Scofield*, 103 N. Y. 630.

A receiver has no power to allow a set-off against a debt owing to the corporation of which he is receiver where the demand sought to be set off was assigned to the debtor for that purpose after his appointment, and what he cannot do directly cannot be done by way of ratification or waiver. *Van Dyck v. McQuade*, 85 N. Y. 616, aff'g 20 Hun, 262.

The receiver of a life insurance company is unauthorized to take, for purposes of distribution, the securities in the hands of the Superintendent of the Insurance Department belonging to said company deposited with him for the protection of policy-holders. (*Ruggles v. Chapman*, 64 N. Y. 557), since it is the duty of the Superintendent to keep these securities, convert them into money, and distribute the funds among the parties entitled. *Smyth v. Monroe*, 84 N. Y. 362; *Matter of Voluntary Dissolution of Home Prov. Safety Fund Assoc.*, 129 N. Y. 288. See 13 Hun, 115; aff'd, 74 N. Y. 617.

The receiver of a street railway company is not liable for negligence in its operation at a time when the title of the railroad was vested in him but before he had assumed its operation. *Lauber v. Lynch*, 65 Misc. 209, 119 Supp. 614.

A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and it is to be enforced by these in their own right and for their own especial benefit. *Farnsworth v. Wood*, 91 N. Y. 308, dist'g *Story v. Furman*, 25 N. Y. 214.

In *Matter of Hoagland v. Robinson Co.*, 36 Misc. 28, 72 Supp. 435, the court considers the respective rights of receivers appointed in dissolution proceedings and in a creditor's action.

As to the right to disaffirm acts of corporation done in fraud of creditors, see *Brouwer v. Hill*, 1 Sandf. Ch. 629; *Gillett v. Moody*, 3 N. Y. 479; *Talmadge v. Pell*, 7 N. Y. 382; *Tuckerman v. Brown*, 33 N. Y. 297; *Brouwer v. Harbeck*, 9 N. Y. 589.

The court has power to vacate a sale made by a receiver in its discretion. *Hackley v. Draper*, 60 N. Y. 88; *Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co.*, 119 N. Y. 15.

A receiver in an action brought under sections 1781, 1782, may not distribute the corporate assets. *Halpin v. Mutual Brewing Co.*, 91 Hun, 220, 148 N. Y. 744.

Subd. 2. Power to Institute Proceedings to Recover Assets. § 240.

§ 240. Power of receiver to institute proceedings to recover assets.

Whenever any receiver of a domestic corporation, or of the property within this state of any foreign corporation, shall have been appointed and qualified, as provided in articles five, six, seven, nine, eleven or twelve of this chapter either before, upon, or after final judgment or order in the action or special proceeding in which such appointment was made, and shall, by his own verified petition, affidavit or other competent proof, show to the supreme court, at a special term thereof, held within the judicial district wherein such appointment was made, that he has good reason to believe that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or concealed, or withholds or has in his possession or under his control, or has wrongfully disposed of, any property of such corporation which of right ought to be surrendered to the receiver thereof; or that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property, the court shall make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property; and at the time of making such order or at any time thereafter, the court may, in its discretion, enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto. No person so ordered to appear and be examined shall be excused from answering any question on the ground that his answer might tend to convict him of a criminal offense; but his testimony taken upon such examination shall not be used against him in any criminal action or proceeding.

Any person so ordered to appear and be examined shall be entitled to the same fees and mileage, to be paid at the time of serving the order, as are allowed by law to witnesses subpoenaed to attend and testify in an action in the supreme court, and shall be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpoena to appear and testify in an action.

Any person appearing for examination in obedience to such order shall be sworn by the court or referee to tell the truth, and shall be entitled to be represented on such examination by counsel, and may be cross-examined, or may make any voluntary

statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.

The court before which such examination is taken, as well as the referee, if one be appointed for that purpose, shall have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examination, to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.

When the examination of any person under such order shall be concluded, the testimony shall be signed and sworn to by the person so examined, and shall be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed; and if from such testimony it shall appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who shall hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice require.

Consolidators' note to section 240. The statute inserted here is entitled "An act to facilitate the collection and recovery of the assets of corporations for which receivers have been appointed." It applies to receivers appointed in proceedings for the voluntary dissolution of a corporation and to actions to dissolve corporations. Appropriate changes in references have been made to carry out the intent of the statute. The statute is a complete scheme for the recovery of assets by receivers and supersedes the following provisions of the Revised Statutes which for that reason have been omitted:

"And all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation. Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 72.

"Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title, or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant commanding any sheriff or constable, to cause such debtor, his wife, or other person to be brought before him at such time and place as he shall appoint, for the purpose of being examined.

"The officer issuing such warrants shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer.

"If any person so brought before such officer, shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein.

"If any person so committed, shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency, in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall recommit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him.

"Any sheriff or jailer wilfully suffering any person so committed or recommitted, pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.

"The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect, as if they had been made in answer to a bill in equity by such trustees." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, §§ 12, 17. See also § 239 subd. 8.

Subd. 3. Settlement of Controversies, § 241.

§ 241. Power of receiver in the settlement of controversies.

If any controversy shall arise between the receivers and any other person, in the settlement of any demands against such corporation, or of debts due to such corporation the same may be referred to one or more indifferent persons, who may be agreed upon by the receivers and the party, with whom such controversy shall exist, by a writing to that effect, signed by them.

If such referee or referees be not selected by agreement, then the receivers or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to any judge of the supreme court at chambers, residing in the same district with said receivers, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

On the day so specified, upon due proof of the service of such notice, the judge before whom the application is made may, in his discretion, proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

When any witness to such controversy shall reside out of the county where the said receivers resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the receivers in the office of a clerk of the supreme court, and an order shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

Consolidators' note to section 241. This section was made applicable by the following provision of the Revised Statutes which latter provision therefore has been omitted.

"Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation (by a reference), as is given by law to trustees of insolvent debtors; and the same proceedings for that purpose shall be had, and with the like effect; and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner, and the referees shall proceed in like manner, and file their report with the like effect in all respects." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 73. See *People v. American Steam Boiler Ins. Co.*, 14 Misc. 165.

The provision authorizing the receiver to agree with a creditor upon a reference of a disputed claim was intended to afford a speedy and an economical method of determining the question at issue without the delay and expense attending an action at law. The object was to keep the contending parties out of court and to free them as far as possible from the forms of legal procedure. Hence, we find the statute providing for a reference of a claim by written agreement designating the referee or referees to whose arbitrament the matter in dispute is to be submitted. The sanction of the court to this agreement is not required, and the selection of the referee is not only free from any judicial supervision or review, but even the discretion of a judge by whom the powers of the court are usually set in motion is dispensed with in the formal order which the statute directs the clerk to enter upon the filing of the agreement. *People v. American Steam Boiler Ins. Co.*, 14 Misc. 162 (167), 35 Supp. 355; aff'd, 3 App. Div. 504.

In *Goodrich v. Sanderson*, 35 App. Div. 546, 55 Supp. 881, the court considered the question whether the receiver had power, under the order appointing him, to make an accord and satisfaction, discussing the provisions of the Revised Statutes conferring powers upon receivers of a corporation, and the effect of sections 1788 and 1789, arriving at the conclusion that under the language of the order the court intended to confer upon the receiver in that case all the powers defined in any statute of this State generally applicable to receivers of corporations.

Subd. 4. Power to Employ and Compensate Counsel. § 242, Rule 81.

§ 242. Power of receiver to employ counsel.

If the receiver of a corporation employs counsel he shall within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain amount or a certain percentage of the sums received and disbursed by him, which contract must be approved by the supreme court, on at least eight days' notice to the attorney-general. A payment by such receiver to his counsel on account of services shall only be made, pursuant to an order of the court, on notice to the attorney-general and subject to review on the final accounting. A contract with counsel shall not be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one

year, if approved by the supreme court on at least eight days' notice to the attorney-general. In case of the intervention of any policyholder or depositor, by permission of the court, such policyholder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policyholder or depositor. It shall be unlawful for receivers of an insurance, banking or railroad corporation, or trust company to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby.

Rule 81. Power of receiver to employ counsel.

No receiver shall have power to employ more than one counsel, except under special circumstances and in particular cases requiring the employment of additional counsel, and in such cases only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. This rule shall apply to all receivers, present and future; and no allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule.

The receiver should select for his counsel an attorney who has not been identified with the legal business of either of the parties to the action. But this rule is subject to the qualification that where such employment is made in good faith, with the assent of the parties, it will escape the condemnation of the court. *Clapp v. Clapp*, 49 Hun, 195; *aff'd* on opinion below, 125 N. Y. 693.

That the receiver should not employ the counsel of either party to the litigation where he is acting adversely to one of them is held in *Hynes v. McDermott*, 3 St. Rep. 592, 14 Daly, 104, while the rule is laid down generally that a receiver must not employ the counsel of either party. *Ex parte Ainsley*, 1 Edw. Ch. 576; *Ray v. MacComb*, 2 Edw. Ch. 165. But it is said that the receiver may employ counsel of either of the parties by consent. *Warren v. Sprague*, 11 Paige Ch. 200, 4 Edw. Ch. 416. See on this point *Bennett v. Chapin*, 3 Sandf. 673; *Smith v. N. Y. Consol. Stage Co.*, 28 How. 377, 18 Abb. Pr. 419.

While the employment by a receiver of his partner as counsel in legal matters relating to the receivership is not to be commended, yet, when it clearly appears that the receiver has not and is not to share in the compensation for such services, there is no law which prevents such employment and payment. *Matter of Simpson*, 36 App. Div. 562, citing *Parker v. Day*, 155 N. Y. 383.

It was held under provisions of chapter 60, of the Laws of 1902, of a similar character, that two things were sought to be accomplished: (1) To limit the payments on account for legal services during the progress of the receivership to such as are approved in writing by the Attorney-General; (2) to prohibit the allowance of compensation to an attorney "unless an agreement for his compensation has been made in writing upon the approval of the Attorney-General."

That the section was not susceptible of the construction that the approval required from the Attorney-General relates to the necessity of employing an attorney and counsel, and that if the necessity of employing an attorney and counsel be conceded, it is the duty of the Attorney-General to approve a contract of employment in which compensation is provided for, generally, without in any way fixing or limiting the amount thereof.

That the Attorney-General should not be required by mandamus to approve a contract made by a receiver with an attorney and counsel selected by him. *Matter of Candee v. Cunneen*, 92 App. Div. 71.

Where a referee, appointed upon the receiver's accounting to take proof upon and report to the court the value of the services rendered to the receiver by his attorney, finds, upon uncontradicted evidence given before him, that the attorney's charges were reasonable, a creditor of the corporation, who appeared before the referee on the first hearing, but omitted to attend the subsequent hearings, on one of which the attorney's fees were considered, or to object to the evidence offered, cannot raise, by exceptions filed to the referee's report, the question of the reasonableness of the attorney's charges for services for which the receiver was liable, although some of the charges did not appear in the account which was rendered by the receiver and referred to the referee.

Services rendered by the attorney to the corporation in the dissolution proceedings, and also in interviews with the corporation and others regarding compromises with creditors, before the appointment of the receiver, are a charge against the corporation, and not against the receiver.

Services rendered by the attorney in criminal proceedings instituted against a third person, on a charge that he had committed perjury on the trial of certain claims against the receiver, are not a charge against the receiver.

A provision in the report, granting the attorney an allowance for services to be subsequently rendered by him upon the accounting, is improper, the proper practice being for the attorney to apply for his counsel fee on the accounting upon the entry of the final order. *Matter of Little*, 47 App. Div. 22, 62 Supp. 27; aff'd on opinion below, 165 N. Y. 643.

In *People v. Federal Bank of N. Y.*, 114 App. Div. 374, a receiver appealed from an order made upon stipulation between the people represented by the Attorney-General and the claimants, who were the only parties to the reference. It was held that a stipulation made by the parties could not be disturbed while it remained in force and that the action of the Special Term in reducing the amount allowed by the referee was unwarranted.

In this case the compensation of the claimants seems to have been stipulated at \$20,000, and it was held that the action of the Special Term in reducing that amount to \$15,000 was unwarranted.

In *Attorney-General v. Continental Life Ins. Co.*, 88 N. Y. 571, the petitioner asking payment of counsel fees was retained by the Attorney-General to appear for him in an action in which the receiver was appointed, and set out services rendered by him; it was held that the amount claimed for such services could not be paid out of the funds in the hands of the receiver. In *Matter of Attorney-General v. North American Life Ins. Co.*, 91 N. Y. 57, it was held that the court had no power to make an allowance to interveners in an action for the dissolution of a life insurance company out of the funds in the hands of the receiver, for their disbursements and counsel fees, as they were simply individual parties protecting their own interest. Same effect, *Attorney-General v. Continental Life Ins. Co.*, 31 Hun, 623. In *Barnes v. Newcomb*, 89 N. Y. 108, an action was brought by an attorney against the receiver of an insurance company to recover for services rendered the company in opposing an application for the receiver's appointment; it was held that the action would not lie, but that the claim should be presented to the court appointing the receiver and the discretion of that court exercised with reference to it.

An application to authorize the receiver of an insolvent corporation, appointed in a proceeding for its dissolution, to pay, as a preferred claim, out of the funds in his hands, a reasonable allowance to counsel employed by the corporation, for services rendered in the defense of the proceedings, is properly denied, where it appears that, by reason of the actual insolvency of the corporation known to its officers, and of their attempt to continue it in business by fraudulent means, the employment of counsel to resist the proceeding was unjustifiable, although the counsel may have acted in good faith and stopped the defense on discovering that the corporation was insolvent. *People v. Commercial Alliance Life Ins. Co.*, 148 N. Y. 563.

An action supplemental to the judgment in an action directing further proceedings by the receiver in the collection of the judgment is not a final order in a special proceeding, and cannot include an extra allowance of fees in lieu of costs to the attorney for the receiver. *Adams v. Elwood*, 104 App. Div. 138, 93 Supp. 327; *Hilson v. Cameron*, 104 App. Div. 138, 93 Supp. 327.

Where a receiver acts in good faith in prosecuting an action it is proper to allow him the costs and expenses incurred therein. *Matter of Merry*, 11 App. Div. 597, 42 Supp. 617.

Where the receiver of a banking corporation has been appointed on the motion of the Attorney-General, the court, on the grounds of public policy, will refuse to approve the receiver's contract employing as counsel a Deputy Attorney-General who resigned his official position in order to accept

the retainer. Moreover, such appointment of counsel will not be confirmed on the application of one of two coreceivers when it appears that the other receiver opposes the appointment and that the two cannot act in accord. *People v. Brooklyn Bank*, 125 App. Div. 354, 109 Supp. 534.

Subd. 5. Miscellaneous Powers and Liabilities. §§ 243, 244, 256-259, 268.

§ 243 (Formerly Code, § 716, in part). Power of receiver to hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

Consolidators' note to section 243. This section is general in its application and therefore has been inserted in this article. It will be preserved also in the Code of Civil Procedure as it applies to other subjects than corporations.

§ 244. Power of receiver to recover stock subscription.

If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum, without the consent of any creditors of such corporation.

§ 256. Refunding consideration of subsisting contracts.

If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.

§ 257. Retention of funds for subsisting contracts and pending suits.

The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements. If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

Consolidators' note to section 257. The following provision of the Revised Statutes is covered by this section and the former therefore has been repealed: "If, at the time any dividend is made, any prosecution be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding, be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 38.

The following section of the Revised Statutes on this subject is inapplicable and is therefore omitted:

"Whenever any bond shall have been executed by an attaching creditor for the purpose in the last section specified, the trustees shall retain a sufficient sum from the monies in their hands to indemnify such creditor, until a final determination be had respecting his liability." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 31.

§ 258. Payment of debts not due.

Every person to whom a corporation shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

§ 259. Allowance of set-offs.

Where mutual credit has been given by any corporation, and any other persons, or mutual debts have subsisted between such corporation and any other person, the receivers may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled, to a dividend, as hereinbefore directed.

No set-off shall be allowed by such receivers, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, in a suit brought by such receivers.

§ 268. Final accounting by receiver.

A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Consolidators' note to section 268. This section supersedes the provisions of the Revised Statutes given below since it provides that the "receiver is not required or authorized to file any account except as herein provided except by special order of the court."

"Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery on oath, which shall be referred to a master to examine and report thereon." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 86.

"Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the court of common pleas of the county in which they reside, or with a clerk of the supreme court, an account in writing of all their proceedings in the premises stating:

1. Their disbursements, commissions and the dividends made by them.
2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them.
3. The property, monies and effects of the debtor remaining in their hands, and the value and situation of such property.

And such trustees may at any time be compelled by rule of the Supreme Court, or of the court of common pleas of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 45.

Subd. 6. Ancillary Receivers.

The status of a foreign receiver, who is also appointed receiver of the assets of corporations in this State by our courts, is dependent on an order of the court appointing him here. *Hammond v. National Life Assoc.*, 31

Misc. 182, 65 Supp. 407; aff'd, 58 App. Div. 453, 69 Supp. 585; dism'd, 168 N. Y. 262.

A receiver of an insolvent corporation of another State, resident therein and appointed by the court of that State having full jurisdiction, in a suit for the winding up of the affairs of the corporation, with power, so far as could be conferred by such appointment, to demand, sue for, collect, receive, and take into his possession all the property, effects, and choses in action of the corporation cannot maintain an action in this State against the corporation as sole defendant for the sole purpose of procuring the appointment in this State of an ancillary receiver, on the fact that the corporation has property within this State that requires administration. *Mabon v. Ongley Elec. Co.*, 156 N. Y. 196, rev'g 24 App. Div. 41, 48 Supp. 967.

A non-resident stockholder of an insolvent foreign corporation, of which a receiver has been appointed in the State of its domicile, and which has never obtained the certificate authorizing it to transact business in the State, required by the Laws of 1892, chapter 687, section 15, may, under sections 1810 and 1812, maintain an action to procure the appointment of an ancillary receiver of its property in this State; but, although a general assignment, made by a corporation, contrary to the law both of the domicile and of the forum, is necessarily invalid, a stockholder, who is not proceeding upon a judgment and unsatisfied execution, cannot impeach the assignment, as the temporary receiver would, after his appointment had been made permanent, be the only person competent to procure it to be set aside. *Walter v. F. E. McAlister Co.*, 21 Misc., 747, 48 Supp. 26.

An ancillary receiver of a foreign corporation appointed under an order investing him "with the usual powers and duties of receivers, according to the laws of this State and the practice of this court," and authorizing him to continue the business, has, except so far as his powers are limited by the fact that his appointment is ancillary, all the powers of trustees of insolvent debtors. *Goodrich v. Sanderson*, 35 App. Div. 546, 55 Supp. 881.

Where the receiver of an insolvent bank of another State, who is also a *quasi*-assignee invested with all rights possessed by its creditors and entitled to bring any action involving its property, funds, and effects in his hands, these including as an asset the right to enforce a several liability for its debts imposed by a foreign statute upon its stockholders in favor of its creditors, after having had that liability determined as to all the stockholders in a proceeding taken in a foreign court, brings an action in the courts of this State to enforce it against a resident stockholder, who had not been a party to the foreign proceeding, and he has had opportunity

here to contest all the essential facts and his exact liability has been here determined on common-law evidence, the Court of Appeals will, in the interests of interstate comity, and because the foreign statute prescribed no remedy for the enforcement of the liability, affirm a recovery here by the receiver where the same does not involve any departure from our practice, nor result in injustice to any of our citizens, or conflict with our public policy. *Howard v. Angle*, 162 N. Y. 179, aff'g 39 App. Div. 151, 57 Supp. 187, 25 Misc. 551, 55 Supp. 1108.

Where the receiver of a national bank of another State appointed by the Comptroller of the Currency brings an action in this State, security for costs can be required of him as a matter of right. *Beckham v. Hague*, 44 App. Div. 146, 60 Supp. 767, rev'g 28 Misc. 753, 60 Supp. 213.

ARTICLE VII.

DUTIES OF RECEIVERS, §§ 245-249.

§ 245. *Duty of receiver to convert assets into money*, 959.

§ 246. *Duty of receiver as to private sales*, 959.

§ 247. *Duty of receiver to keep accounts*, 959.

§ 248. *Duty of receiver to serve copy of report upon Attorney-General and Superintendent of Banks*, 959.

§ 249. *Duty of certain receivers to make reports*, 960.

§ 245. **Duty of receiver to convert assets into money.**

The receivers shall, as speedily as possible, convert the property, real and personal, of the corporation into money.

§ 246. **Duty of receiver as to private sales.**

A receiver duly appointed in this state by and pursuant to a judgment in an action, or by and pursuant to an order in a special proceeding may, upon application to the court by which such judgment was rendered, or such order was made, and upon notice to such parties as may be entitled to notice of application made in such action or special proceeding, be authorized by the said court to sell or convey the property, whether real or personal, of the corporation of which he is the receiver, at private sale, upon such terms and conditions as the court may direct.

Consolidators' note to section 246. This section is general in its application and therefore has been inserted. It will also be taken care of in the Code of Civil Procedure as it relates to other subjects than corporations.

§ 247. **Duty of receiver to keep accounts.**

They shall keep a regular account of all moneys received by them as receivers; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

§ 248. **Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.**

All receivers of insolvent corporations who are required by law to make and file reports of their proceedings shall at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as report to, and are under the supervision of, the banking department shall on the first day of January and July of each year, during the continuance of their respective trusts, file with the superintendent of banks, a report, verified by oath, in such form as the superintendent may prescribe, showing the condition of their respective trusts. In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is required by law to make and file such report, or shall neglect for the same length of time

to serve a copy thereof on the attorney-general, as required by this section the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

Consolidators' note to section 248. Sections 3 and 4 of L. 1880, chap. 537 have been repealed because covered by sections 7 and 8 of L. 1883, chap. 378, which latter sections have been consolidated in the text as sections 253 and 254. See *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 175; *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 165; 66 App. Div. 444; 76 Hun, 220; 57 Hun, 441; 3 App. Div. 504.

§ 249. Duty of certain receivers to make reports.

It shall be the duty of every receiver of an insurance, banking, or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company, with the superintendent of banks; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months. Of the intention to present such account, as aforesaid, the attorney-general, and also the surety or sureties on the official bonds of such receiver, shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receivers at least once every twelve months.

On the dissolution of a corporation the trustees must convert the assets into money. They cannot invest them in stock of another corporation without the consent of all the stockholders. *Frothingham v. Barney*, 6 Hun, 366. Where a corporation is dissolved because the trustees cannot agree the court may, after the payment of the liabilities and expenses of the receivership, order a sale and distribution of the remaining assets. *Ex parte Woven Tape Skirt Co.*, 8 Hun, 508.

It is his duty to collect the assets of the corporation and reduce its choses to possession, and with all convenient haste to make distribution among the creditors and other parties entitled. *Beach on Receivers*, § 439, and cases cited. It is his duty to collect all the debts due the company. *Van Buren v. Chenango Ins. Co.*, 12 Barb. 671.

A receiver of an insolvent corporation is not bound to complete its contracts; but where he does so with the consent of all the parties interested, the cost of completion is chargeable against special creditors who have an assignment of, or lien upon, the proceeds of such contract, and is to be deducted therefrom before they are paid over; but the special creditors may prove such costs against the general fund and share *pro rata* with the general creditors. *Matter of A. E. Chasmar & Co.*, 22 Misc. 680.

Under an order authorizing him to continue the business and make up and dispose of such goods as he can manufacture at a profit for such period of time as to him seems beneficial to the creditors and stockholders, or until the further order of the court, and to make contracts therefor, the receiver of a corporation has no authority to contract for the future mak-

ing and delivery of goods within a specified time, and he cannot recover for a loss of profits in case of a breach of such contract by the failure of the other party thereto. *Matter of Punnett Cycle Mfg. Co.*, 24 Misc. 310, 87 St. Rep. 204; aff'd, 33 App. Div. 643, 54 Supp. 1114.

A receiver is under no obligation to attempt to take property and prove possession of a third person, by force, without an express order of the court directing him to do so. The proper course is for the receiver to call upon the court to decide as to what property the receiver is entitled under the order of the court, and where it is in the possession of the third person who claims the right to retain it, the receiver must proceed by suit against him. *Parker v. Browning*, 8 Paige, 388.

A receiver being an officer of the court and subject to its direction, and being charged with responsible and often embarrassing duties, it is proper that he should, on suitable occasions, apply to the court for instructions. *Matter of Van Allen*, 37 Barb. 225. And if there is danger that the fund will be unfairly distributed, he may apply to the court for its protection. *People v. Security, etc., Co.*, 79 N. Y. 267.

He is not obliged to redeem stock which the firm had pledged by paying the debts secured by such pledge. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

A receiver has no authority without the direction or consent of the court to invest the moneys in his hands. In the absence of such direction, it is his duty simply to keep and protect the trust fund and hold it ready for distribution. Where, however, a receiver, without authority of the court, but acting in entire good faith, placed the funds in the hands of brokers to be loaned on call and charged himself with the amounts received for interest, it appearing that no part of the fund was lost and that the parties interested therein were not injured, but were probably benefited, it was held that an order charging the receiver with interest beyond the amount received was error. *Attorney-General v. North Amer. Life Ins. Co.*, 89 N. Y. 94, modif'g 26 Hun, 294.

A permanent receiver of a banking corporation in proceedings for its dissolution, who entered into possession of the property leased to the corporation, is liable upon the covenants of the lease for the payment of rent which falls due during the period of his occupancy by reason of the privity of estate created by such entry. *Prince v. Schlesinger*, 116 App. Div. 500, 101 Supp. 1031.

Occupation by the temporary receiver of a corporation in voluntary dissolution, of a part of premises under lease to it, upon his representation to the landlord that he would apply to the court for permission to pay the rent accruing from subtenants; held, not to make him personally liable for the rent. *Met. Life Ins. Co. v. Sanborn*, 34 Misc. 531, 69 Supp. 1009.

Where the receiver of an insolvent company continued to occupy and use premises, after his appointment, theretofore used by the company, he was held liable for the rent during the period of such occupation, and it was held error to refer the matter to a general referee appointed to pass on claims against the corporation. *People of State of N. Y. v. The Universal Life Ins. Co.*, 30 Hun, 142. The general rule is that when a receiver under orders of the court continues to use property theretofore used by the corporation, there is a just claim against him, and will be directed to be paid out of the assets which come into his hands. *Myers v. Car Co.*, 102 U. S. 1; *Kneeland v. Amer. Loan & Trust Co.*, 136 U. S. 89.

In *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174, it was held that the agent of an insolvent corporation had no valid claim upon the fund in the hands of a receiver for damage for an alleged breach of a contract because of the discontinuance of the employment, at least in the absence of evidence that it was some fault of the company which brought about the insolvency. It seems that as between the company and the person thus contracting, its dissolution by virtue of proceedings on the part of the people is to be deemed the independent act of the State, and not the act of the corporation, and the person contracting took the risk of any act or neglect on the part of the other officers of the corporation. See *Lorillard v. Clyde*, 142 N. Y. 456. But a lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory, and a receiver is authorized to retain out of its assets sufficient to cancel and discharge such open and subsisting engagements. *People v. Nat. Trust Co. of City of N. Y.*, 82 N. Y. 283.

As to obligations of a receiver for payment of a note received by the corporation of which he is receiver before its maturity, and which was canceled and surrendered to the maker upon payment being made to him, see *Arnot v. Bingham*, 55 Hun, 553, where it held that the owners of the note are entitled to collect from the receiver the avails so collected by the bank. See, also, *People of the State of N. Y. v. The Bank of Dansville*, 39 Hun, 187, and upon the same point, *McCall v. Frazier*, 40 Hun, 111. See *Importers & Traders' Nat. Bank of N. Y. v. Peters*, 123 N. Y. 272, as to recovery of moneys held by a person in a fiduciary capacity which he had deposited in his account at the bank, by reason of fraudulent action on the part of the bank after appointment of a receiver. See, also, *Drexel v. Pease*, 129 N. Y. 96, 133 N. Y. 133.

In *People v. Merchants & Mechanics' Bank*, 78 N. Y. 269, an order requiring a receiver to pay certain moneys upon the ground that the assets came into the hands of the receiver impressed with a trust in favor of the party making the application, it was held that in order to authorize such relief, it was necessary to trace into the hands of the receiver money or

property which belonged to the party making the application, or which had before the receivership been set apart and appropriated for his benefit. Where a creditor of a savings bank obtained a judgment against a receiver thereof in an action brought against the bank for the appointment of a receiver, in which action the receiver was substituted as defendant, plaintiff was not entitled to a preference over depositors in the payment of his judgment. *People v. Mechanics & Traders' Savings Bank*, 92 N. Y. 7, rev'g 28 Hun, 375.

A receiver is bound to comply with his contracts, where they are made with the permission or by the direction of the court. *Matter of U. S. Rolling Stock Co.*, 57 How. 17; *Jay v. De Groot*, 2 Hun, 205. The court may, on petition and application of the Attorney-General, and on notice to the insolvent corporation and the receiver, in its discretion, make an order directing him to pay a tax imposed upon the corporation, since the claim of the State for the payment of the tax is a paramount one. *Central Trust Co. v. N. Y. City & Northern R. R. Co.*, 110 N. Y. 250, rev'g 47 Hun, 587.

So far as a receiver assumes obligations of contracts, acting within the authority of the order which creates the receivership, he will be held to the legal obligations of such contracts. *Woodruff v. Erie R. R. Co.*, 93 N. Y. 609.

A contract of sale, made by the receiver of an insurance company, is, while executory, subject to the supervision of the court, which may sanction or disapprove it. If the sale appears to be inequitable, the court will refuse to direct the receiver to complete it. *Attorney-General v. Continental Life Ins. Co.*, 94 N. Y. 199. A court which has, in its exercise of a rightful jurisdiction, appointed a receiver, can make an order prohibiting any after-interference, by way of levy or seizure, with the property in his possession, outside of the provisions of the Code. *Woerishoeff v. North River Constr. Co.*, 99 N. Y. 398. The authority of the court to compel the receiver of a corporation to allow a creditor to make extracts from the books of the corporation rests on grounds of justice and equity in administering the trust, and the granting or refusing an application of that character is in the discretion of the court. *Matter of Tiebout*, 19 Wkly. Dig. 570.

The rule is that a person employed by a trustee, receiver, general assignee, executor, or administrator, in matters pertaining to the execution of the trust, must look to the person employing him individually for his compensation, as the contract does not bind the estate he represents. The title to the trust property vests in these different officials and they must account for it to the persons ultimately entitled thereto; they are individually liable because they have no responsible principal behind them for

whom they may contract and against whom the creditor may enforce his demand. *Patton v. R. B. P. Co.*, 114 N. Y. 4; same rule, *Davis v. Stover*, 16 Abb. N. S. 277; *People v. Universal Life Ins. Co.*, 30 Hun, 142; *Ryan v. Rand*, 20 Abb. N. C. 314. In such case, if the plaintiff cannot recover against the receiver he has no right of action and his claim cannot be enforced, since a receiver cannot, by his own motion, contract debts chargeable upon the fund in litigation; while a court may allow expenses incurred by a receiver for the preservation of the property, it is, nevertheless, the order of the court and not the act of the receiver which creates the charge and upon which its validity depends. *Vilas v. Page*, 106 N. Y. 451. It seems that an agreement may be made by which the receiver may be exonerated from individual liability and contract entered into by which the party performing services may look to the trust estate. *New v. Nicoll*, 73 N. Y. 127; *Foland v. Dayton*, 40 Hun, 563; *Martin v. Platt*, 51 Hun, 435. This rule seems to be based upon the ground that a claim may be perfectly proper so far as the plaintiff is concerned, and still improper as against the estate; that the receiver may have been guilty of some act which would render the allowance of the claim against the estate improper. Opinion Martin, J., in *Rogers v. Wendell*, 54 Hun, 544.

In *Raht v. Attrill*, 106 N. Y. 423, 11 St. Rep. 9, where a receiver had made certain expenditures under the order of the court where notice had not been given to the proper parties, it was held that, although strong reasons existed for the expenditure, this did not justify it, that the debt created by the receiver was not one for the preservation of the property, and the granting of an order for such expenditure without notice to the mortgagee or bondholders did not bind them as an adjudication.

Where a receiver of a corporation undertakes to carry out a contract made by the corporation before his appointment, he cannot receive the benefits of the performance without satisfying the obligations of the company under the contract. *Commercial Pub. Co. v. Beckwith*, 167 N. Y. 329, rev'g 42 App. Div. 621, 59 Supp. 1101.

Upon proof of loss sustained by reason of the receiver's neglect of duty, he is chargeable with such loss. *Clapp v. Clapp*, 49 Hun, 195, 1 Supp. 919; aff'd, 125 N. Y. 693. Where a receiver deposits funds in his own individual name and not as receiver, mingling them with his own funds, if the bank fails he will be charged with the loss resulting. *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Matter of Stafford*, 11 Barb. 353. In *Cardot v. Barney*, 63 N. Y. 281, it was held that a person acting as receiver of an insolvent railroad corporation and running the road was not personally liable in an action for negligence where no personal neglect was imputed to him either in the selection of agents or in the performance of any duty, but where the negligence was that of a subordinate employed in compliance with the order of the court.

In *Kain v. Smith*, 80 N. Y. 458, it was sought by counsel to have this rule extended so as to relieve the receiver, as such, from liability. The court, however, distinguished the liability of the person acting as receiver in his individual capacity and the liability of the trust fund, holding that damages for injury to the person would be chargeable upon and payable out of the fund in court, the same as other expenses of administration.

This principle was applied in *Camp v. Barney*, 4 Hun, 373, and in *Graham v. Chapman, Receiver*, 33 St. Rep. 349, it is held that a receiver must be held liable for injuries to his employee, in the same manner and to the same extent as the corporation itself would be held if it had not gone into the hands of a receiver. See, also, *Durkin v. Sharp*, 88 N. Y. 225; *Fuller v. Jewett*, 80 N. Y. 46. In a note to 15 L. R. A. 120 attention is called to the fact that *Cardot v. Barney* has not been followed even in this State, and has been severely criticised in other States. It is stated that this decision probably arises from the fact that the action was brought against the receiver personally.

The liability of a temporary receiver under section 1788 is considered in *Mercantile Trust Co. v. Kings Co. El. R. R. Co.*, 40 App. Div. 141, 57 Supp. 892, and it is held that a person who furnishes supplies to a railroad company, prior to the commencement of the action to foreclose a mortgage upon its property, in which a temporary receiver was appointed, is not entitled to a preferential payment of such claim out of the assets in the hands of the receiver, where there is no provision in the order appointing him receiver, authorizing him to pay any of the debts of the corporation. Citing *Decker v. Gardner*, 124 N. Y. 334 (338); *Franklin Trust Co. v. N. A. R. R. Co.*, 11 App. Div. 249 (257); *Metropolitan Trust Co. v. T. V. & C. R. R. Co.*, 103 N. Y. 245.

It is further held that a different question would be presented if it appeared that the payment of the claim is essential to enable the receiver to continue the operation of the road, as in case of the claim for wages of persons in the employ of receivers or current expenses. Citing *Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co.*, 148 N. Y. 315.

A receiver of a corporation, although he has accounted and been discharged, may be compelled to account to parties from whom the corporation acquired property by fraud, or what he received from such property, unless his account was so stated that the order of discharge would be a defense. *Pondir v. N. Y., L. E. & W. R. R. Co.*, 31 Abb. N. C. 29, 72 Hun, 384, 55 St. Rep. 63, 25 Supp. 560.

One who is employed by a receiver in matters pertaining to the execution of the trust must look to him in his individual capacity for his compensation; the receiver's contract does not bind the estate. *Ryan v. Rand*, 20 Abb. N. C. 313, 9 St. Rep. 523. The receiver, who, without an order

of the court, runs a hotel, was held individually liable for supplies furnished the hotel. *Sayles v. Jordan*, 2 Supp. 827, 19 St. Rep. 349; aff'd without opinion, 121 N. Y. 685. A receiver of a railroad who operates and controls it is liable for injuries of his employees to the same extent as the company would have been. He cannot absolve himself from liability for not keeping the tracks in good condition by showing the lack of funds. *Graham v. Chapman*, 33 St. Rep. 349, 11 Supp. 319. The nature and extent of the liability of a receiver on turning over assets to his successor under the order of the court is discussed in *Clapp v. Clapp*, 27 St. Rep. 180, 7 Supp. 495; aff'd without opinion, 125 N. Y. 693. The court may appoint a receiver to carry on a business in a proper case. *Jackson v. DeForest*, 14 How. Pr. 81; *Smith v. N. Y. Consol. Stage Co.*, 28 How. Pr. 377, 18 Abb. Pr. 419; *Heatherton v. Hastings*, 5 Hun, 459.

Where defendant in this State was appointed receiver of a corporation and employed plaintiff to care for the property, it was held that, in the absence of an express agreement to exonerate the receiver, he was individually liable. *Rogers v. Wendell*, 54 Hun, 540, 28 St. Rep. 301, 7 Supp. 781, citing *Schmitter v. Simon*, 101 N. Y. 557; *Willis v. Sharp*, 113 N. Y. 586; *Austin v. Munro*, 47 N. Y. 360; *Noyes v. Blakeman*, 5 N. Y. 567; *Mygat v. Wilcox*, 45 N. Y. 306; *Patton v. R. B. P. Co.*, 114 N. Y. 4; *Vilas v. Paige*, 106 N. Y. 439.

For liability of receivers of insolvent insurance companies to policyholders, see *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 115; *Attorney-General v. Guardian Mut. Life Ins. Co.*, 82 N. Y. 336; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *People v. Knickerbocker Life Ins. Co.*, 40 Hun, 44; *People v. Universal Life Ins. Co.*, 42 Hun, 616.

While a receiver who, without authority, contracts an indebtedness, may be personally charged therefor, he may not be held liable if, having authority, he contracts with the distinct understanding that the purchases are made on account of the receivership, and they are charged and billed to him as receiver. *Nason Mfg. Co. v. Garden*, 52 App. Div. 363, 65 Supp. 147, dist'g *Meyer v. Lexow*, 1 App. Div. 116.

No damages can be awarded personally, in ejectment, against a receiver in possession when the action was begun and who had collected rents, he being made a party in his representative capacity, nor in such capacity if he paid over such rent pursuant to an order made in the action in which he was appointed. *Pfeffer v. Kling*, 58 App. Div. 179, 68 Supp. 641; aff'd, 171 N. Y. 668.

Receivers are only liable on contracts made in their official capacity to the extent of the property in their hands, which liability must be enforced in the receivership proceedings. *Stannard v. Reid & Co.*, 118 App. Div. 304, 103 Supp. 521.

Where the receiver of a hotel building was directed to collect from the tenants in possession or other persons liable therefor all rents due, and it did not appear that plaintiff company, the then tenant, and which had been conducting a hotel business in the building, was at the time it surrendered possession indebted for rent, the receiver was liable for money collected by him which was due plaintiff from former guests. *St. Paul Hotel Co. v. Segrave*, 48 Misc. 657, 96 Supp. 308.

A temporary receiver, who takes property belonging to a third person, in the belief that it belongs to his trust, is personally liable for his conversion, and may, after a demand for the property and a refusal on his part to deliver it, be sued by the third person as of right, without the permission of the court.

Where, however, the court, upon the accounting of the temporary receiver, to which the third person made himself a party, makes an order directing the temporary receiver to retain the property converted as permanent receiver, he is entitled to the protection of the court and cannot be sued without its permission. *Fallon v. Egberts Woolen Mills Co.*, 56 App. Div. 585, 67 Supp. 347.

A receiver of a corporation, authorized by the order appointing him "to carry on and continue the business" of the corporation, who purchases goods necessary to enable him to do so, and accepts as receiver a draft for the purchase price drawn upon him as receiver by the vendor, is not individually liable for the amount of the draft, where it appears that the vendor dealt with the receiver upon the faith of the receivership alone. *Olpherts v. Smith*, 54 App. Div. 514, citing *Nason Mfg. Co. v. Garden*, 52 App. Div. 363; *aff'd*, 173 N. Y. 593.

A receiver of a corporation duly appointed by a United States District Court in one State, and empowered "to carry on and continue the business . . . so far as may be necessary for the preservation from loss of the outstanding contracts" of the corporation, may make purchases in another State, in order to complete the manufacture of certain articles, without being personally liable therefor, provided that he discloses the character in which he assumes to act and the source of his authority. *Sager Mfg. Co. v. Smith*, 45 App. Div. 358, 60 Supp. 849; *aff'd*, 167 N. Y. 600.

ARTICLE VIII.

SUITS BY AND AGAINST RECEIVER. § 239, subd. 1.

Subd. 1. Right of receiver to maintain action, 967.

§ 239, subd. 1. *General powers of receivers*, 967.

Subd. 2. Actions against receiver, 971.

Subd. 1. Right of Receiver to Maintain Action.

§ 239. General powers of receivers.

The said receivers shall have power:

1. To sue in in their own names or otherwise, and recover all the property, debts and things in action, belonging or due to such corporation in the same manner and

with the like effect as such corporation might or could have done if no receivers had been appointed; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such corporation before the appointment of the receiver of such corporation; notwithstanding the notice to creditors the receivers may sue for and recover, any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof; * * *

A receiver may bring suits in any court under his general authority. *Rockwell v. Merwin*, 45 N. Y. 166. To show the authority of a receiver to sue, it is sufficient to produce the petition, the order appointing him, and his official bond. *Palmer v. Clark*, 4 Abb. N. C. 25. The receiver of an insolvent corporation has power to maintain a suit, to set aside a judgment against it, on the ground that it was without consideration, obtained by collusion with the officers, and in fraud of creditors. *Whittlesey v. Delaney*, 73 N. Y. 571. The receiver of a corporation may maintain an action to determine the validity of bonds claimed to be secured by a mortgage on its property. *Hubbell v. Syracuse Iron Works*, 42 Hun, 182. And to set aside a mortgage on the ground that the written consent of the holders of two-thirds of the capital stock was not secured. *Vail v. Hamilton*, 85 N. Y. 453. To disaffirm or set aside illegal or fraudulent transfers of corporate property made by agents or officers thereof, or to recover funds or securities invested or misapplied. *Attorney-General v. Guardian Mut. Ins. Co.*, 77 N. Y. 272. A receiver has power to prosecute a pending action; it does not abate by his appointment. *Phoenix Co. v. Badger*, 67 N. Y. 294.

A temporary receiver may maintain an action to recover moneys collected under a judgment entered against a corporation, upon an order made in contemplation of insolvency, and the corporation is not a necessary party to such an action. *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42, 44 N. E. Rep. 944, aff'g 76 Hun, 220, 27 Supp. 733, 59 St. Rep. 120.

A receiver may maintain an action to determine priorities between conflicting claims to the fund remaining in his hands after final judgment. *Bamberger v. Fillenbrown*, 12 Misc. 328, 33 Supp. 614, 67 St. Rep. 321. It is proper to deny a motion to direct the receiver of a corporation to sue directors, where notice of the motion has not been given to all the persons to be proceeded against. *People v. Life Union*, 84 Hun, 560, 32 Supp. 1148. Where a receiver has been directed by the court to bring an action against certain directors of a bank, and neither the receiver, creditor, nor the stockholders appeal from the order, the court will not reverse the order upon an appeal by the directors, even though they are also stockholders. *People v. Com. Bank*, 6 App. Div. 194, 39 Supp. 1000.

A foreign receiver can sue in this State, where there are no local interests adverse to the suit. *Dyer v. Power*, 39 St. Rep. 136, 14 Supp. 873.

An ancillary receiver of a foreign corporation, unless the order of ap-

pointment provides otherwise, has only the powers of a temporary receiver, and cannot maintain an action in disaffirmance of fraudulent transfer by the corporation. *Buckley v. Harrison*, 10 Misc. 683, 31 Supp. 999, 65 St. Rep. 93.

A permanent receiver of a corporation which, while insolvent, executed a bill of sale of its property in contravention of the Stock Corporation Law, section 48, as amended by the Laws of 1892, chapter 688, may maintain an action for conversion against the vendee, and is not obliged to bring a suit in equity to compel such vendee to account for the property thus transferred. *McQueen v. New*, 45 App. Div. 579, 61 Supp. 464.

The receiver has such an interest in the property as is sufficient to enable him to prosecute an action to set aside a mortgage executed by the corporation without the assent of the stockholders. *Vail v. Hamilton*, 85 N. Y. 453. Or to avoid a chattel mortgage upon the property of the corporation. *Rudd v. Robinson*, 54 Hun, 339, 7 Supp. 535; rev'd on another ground, 126 N. Y. 113. In such case the receiver represents not only the creditor in whose suit he has been appointed, but the other creditors of the corporation, and is empowered to maintain an action to set aside a mortgage by chapter 314 of the Laws of 1858. The provisions of this statute are now contained in section 19, Personal Property Law, a like provision as to real estate, section 268, Real Property Law. He may bring an action to determine what bonds which have been issued by a company are secured by a mortgage issued by it, and what bonds should be excluded from sharing in the proceeds arising from the foreclosure of the mortgage. *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340. And he may maintain an action to determine the validity of bonds and to what extent a mortgage is a valid and subsisting lien upon the property of the corporation. *Hubbell v. Syracuse Iron Works*, 42 Hun, 182, 4 St. Rep. 690. A receiver may disaffirm the validity of acts of a corporation void in themselves where such acts are forbidden and unauthorized by law. *Hoyt v. Thompson*, 5 N. Y. 320; *Leavitt, Receiver, v. Yates*, 4 Edw. Ch. 134. A receiver of an insolvent corporation suing for the benefit of its creditors, on a cause of action which the corporation itself could not have sued upon, to recover back payments made by the corporation in fraud of the creditors, represents rather creditors than the corporation, and a claim against the corporation cannot be offset against a claim due to the representative of the creditors. *Osgood v. Ogden*, 3 Abb. 425.

A receiver may sometimes assert the rights of creditors which he might be unable to assert as representative of a corporation upon the principle which permits a receiver of an insolvent corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights. *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46, 24 Abb. N. C. 96, 28 St.

Rep. 807, aff'g 24 St. Rep. 848, 53 Hun, 67, 23 Abb. N. C. 298, 6 Supp. 433.

A receiver may take advantage of any fraud in derogation of the rights of creditors and any transaction prohibited by law, to which the corporation was a party. *Nathan v. Whitlock*, 9 Paige, 152; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Osgood v. Laytin*, 3 Abb. Ct. App. Dec. 418. He has also the right of action against the stockholders of the company to recover the amount of their unpaid subscriptions to its capital stock. *Dayton v. Borst*, 31 N. Y. 435; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Whittlesey v. Frantz*, 74 N. Y. 456; *Pentz v. Hawley*, 1 Barb. Ch. 122. He may prosecute the stockholders separately if he sees fit. *Van Wagonnen v. Clark*, 22 Hun, 497. He may maintain an action to restrain judgment creditor from proceeding against a stockholder on account of his unpaid subscription. *Rankine v. Elliot*, 16 N. Y. 377. The receiver has the right of action against the directors of a corporation who misapplied its funds or suffered them to be wasted by gross neglect or inattention. *Brinkerhoff v. Bostwick*, 88 N. Y. 52. See *Wyckoff v. Scofield*, 98 N. Y. 475; *Lofsky v. Mauger*, 3 Sandf. Ch. 69.

Section 1788, in regard to temporary receivers, requiring them to qualify as prescribed by law for the qualification of permanent receivers, applies only to those things which a receiver must do in order to qualify him to act as such receiver, and not to his proceedings after his qualification. *Nealis v. American Tube & Iron Co.*, 76 Hun, 220, 59 St. Rep. 120, 27 Supp. 733; aff'd, 150 N. Y. 42.

An action to set aside a fraudulent transfer cannot be maintained by a receiver appointed in sequestration proceedings, unless the complaint alleges that he has obtained leave to sue. *Morgan v. Bucki*, 30 Misc. 245, 61 Supp. 929.

An action to procure the cancellation of a judgment entered against a corporation by default upon the ground that the note sued upon was given without consideration cannot be maintained by a receiver of the corporation appointed after the judgment was procured where the complaint contains no allegation of fraud, collusion, accident, mistake, or any other ground for equitable interference. *Ingalls v. Merchants' National Bank*, 51 App. Div. 305, 64 Supp. 911.

Where he desires to obtain possession of books or any other property claimed by the company, which was in its possession, he must institute proper proceedings for their recovery so that there may be a determination of the question of ownership. *Olmstead v. Rochester & Pittsburg R. R. Co.*, 46 Hun, 552.

A receiver, suing to enforce the common-law liability of a director of a corporation, may assert the unconstitutionality of a statute reducing the

limitation upon such an action from six to three years, which does not provide a reasonable time after the time of its taking effect during which liabilities already incurred may be enforced. *Gilbert v. Ackerman*, 159 N. Y. 118, aff'g 33 App. Div. 371, 54 Supp. 113.

The court may make an order authorizing a receiver to take advice of counsel as to a defense but authority to defend the action, if his attorney so advises, must be given by the court upon a proper petition or affidavit. *Troy Savings Bank v. Morrison*, 27 App. Div. 423, 50 Supp. 225.

Subd. 2. Actions Against Receiver.

An action brought against a receiver without the permission of the court will be stayed on motion, *DeGroot v. Jay*, 30 Barb. 483, 9 Abb. Pr. 364, but such suit is regular until the court interferes and a judgment therein is valid. *Hackley v. Draper*, 4 T. & C. 614; aff'd, 60 N. Y. 88. The omission to obtain leave to sue the receiver is not jurisdictional, although not doing so is a contempt. If the contempt be not willful, leave to sue may be granted *nunc pro tunc* on terms which will indemnify the receiver. *James v. James Cement Co.*, 8 St. Rep. 490. The commencement of an action against a receiver without leave does not affect the jurisdiction of the court, but the remedy is by motion to stay proceedings, or the punishing of plaintiff for contempt. In a proper case leave to sue will be granted *nunc pro tunc*. *Hirshfeld v. Kalischer*, 81 Hun, 606, 30 Supp. 1027, 63 St. Rep. 220. On an application to punish a party for contempt for suing the receiver of a corporation without leave of the court, notice of such application must be given the Attorney-General. *Langdon v. N. Y. Book Co.*, 39 St. Rep. 167, 14 Supp. 308, 20 Civ. Pro. 280.

Leave will not be granted, while a receiver is discharging his duties in the manner directed by the court, to bring an action against him charging that he is a trespasser in so doing. *Hardt v. Levy*, 79 Hun, 351, 61 St. Rep. 40, 29 Supp. 375.

No creditor of a corporation can sue the receiver, or obtain payment out of the property of the corporation, except by consent of the court. The court may authorize the receiver to sue on his application, or it may hear the claim upon affidavits, or oral evidence; or where a claim is disputed it may order a reference. *Matter of N. Y. & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. Rep. 1036, 24 St. Rep. 560, aff'g 43 Hun, 565.

Where a petitioner, having leave to sue a receiver, asserts that his claim has been admitted to be due, no action against the receiver should be allowed to establish it, and the court will make no order to pay it unless it appears that the receiver has assets sufficient to pay all the other creditors. *Matter of Machwirth*, 15 App. Div. 65, 44 Supp. 80.

The right of a person who has a lien on property to hold possession of it is not affected by the recovery of judgment for the amount of the in-

debtedness, and the lienor has a right to foreclose his lien and make the defendant's receiver a party, and should have leave to sue the receiver for that purpose. *Pate v. Hoffman*, 40 St. Rep. 915, 61 Hun, 386, 16 Supp. 74. Where a corporation is sued for an alleged trespass and attempts to justify under an agreement with a receiver who never authorized the act complained of, such a fact does not make the action one against the receivers, so as to require leave of the court for its prosecution. *Farnsworth v. Western Un. Tel. Co.*, 6 Supp. 735, 25 St. Rep. 393.

An action for tort against a receiver of a corporation may be maintained, although committed by the corporation before his appointment. *Decker v. Gardner*, 33 St. Rep. 541, 11 Supp. 388. See *Decker v. Gardner*, 124 N. Y. 334.

And receivers of a foreign corporation appointed by the United States court may be sued in the courts of this State, where permission to do so is granted by the court which appointed them. *Carrey v. Spencer*, 36 Supp. 886, 72 St. Rep. 108.

A motion for leave to sue a receiver is, in effect, a motion in the action in which the receiver was appointed, and must be made in the judicial district in which such action was brought or in a county adjoining the county in which it was brought.

An order granting leave to sue a receiver, made upon notice, is one affecting a substantial right and is appealable to the Appellate Division. *Matter of Commercial Bank*, 35 App. Div. 224, 54 Supp. 722.

Where a receiver, in an action against a corporation, fraudulently obtains an order for the sale of a debt due the corporation, an equitable action, at the suit of the creditor, will lie to vacate the order and set aside the sale. *Hackley v. Draper*, 60 N. Y. 88, aff'g 2 Hun, 523.

An action will not lie against a receiver to recover for services rendered the corporation after the appointment of a receiver. *Barnes v. Newcomb*, 89 N. Y. 108. But where a party obtained judgment in an action brought before appointment of a receiver, the expense of the action being incurred for the benefit of the fund, the receiver will be required to pay the costs out of the fund. *Locke v. Covert*, 42 Hun, 484.

The court will not grant permission to bring suit against a receiver where the claim has not been formally presented to the receiver. *Matter of Machwirth*, 15 App. Div. 65, 44 Supp. 80.

Where a receiver holds property belonging to a third person by order of the court, in a proceeding to which the owners were parties, he cannot be sued without the permission of the court. *Fallon v. Egberts Woolen Mills Co.*, 56 App. Div. 585, 67 Supp. 347.

Where a receiver takes possession of and accounts for certain property, which did not belong to the concern for which he was appointed receiver,

the owner of such property should apply to the court for relief or obtain leave of court before bringing action. *Case v. Duffy*, 86 Supp. 778.

Where an action in replevin is brought against a receiver, service of summons and process will not be set aside on the ground that the order permitting suit against him was not entered until two or three days after the commencement of the action. *Marshall v. Friend*, 33 Misc. 443, 68 Supp. 502; aff'd without opinion, 59 App. Div. 628, 69 Supp. 1140.

An action of trespass, brought without leave of the court and with knowledge that the defendant has been regularly appointed receiver of the property which is the subject of the action, has a direct tendency to defeat, impair, and prejudice the rights of the receiver in connection with his control and preservation of the property, and constitutes a contempt of court. *Greene v. Odell*, 43 App. Div. 608, 60 Supp. 346.

There is no exception to the rule that the receiver cannot either sue or be sued without leave of the court making the appointment. Where an action has been commenced against a receiver without leave, the court acquires jurisdiction of the defendant receiver by the service of a summons, and the remedy is, either to stay all proceedings on the part of the plaintiff, or punish plaintiff for contempt of court, or both. *James v. James Cement Co.*, 8 St. Rep. 490, and cases cited.

In the absence of an allegation in the complaint that the action is brought with the consent of the court appointing the receiver there is a failure to state facts sufficient to constitute a cause of action. *Clukies v. Bank of N. Y.*, 74 App. Div. 39, 76 Supp. 826.

The commencement of an action against a receiver without leave does not affect the jurisdiction of the court. The rule requiring leave to sue a receiver is not statutory and is not elementary to the action. Suing without leave is purely a question of contempt of court. The court, on motion, may set aside or stay the proceeding commenced without its sanction, but until the court interferes the action is regular. *Pruyn v. McCreary*, 105 App. Div. 302, 93 Supp. 995.

An action against a receiver appointed by the Federal courts may be brought in any court otherwise having jurisdiction of the action, without previous leave of the court appointing the receiver, where the action originates in any act or transaction of the receiver in carrying on the business connected with the property of which he is receiver. *Orr Co. v. Cushman*, 54 Misc. 121, 104 Supp. 510.

ARTICLE IX.

DISTRIBUTION OF FUNDS; PREFERENCES. §§ 260-267; Labor Law, § 9.

§ 260. *Penalties recovered by receiver*, 974.

§ 261. *Order of payment by receiver*, 974.

§ 9, Labor Law. *Payment of wages by receivers*, 974.

§ 262. *Failure to file claim before first dividend*, 974.

§ 263. *Second dividend by receiver, 975.*

§ 264. *Surplus to stockholders, 975.*

§ 265. *Disposition of moneys retained by receiver for suits, 975.*

§ 266. *Duty of receiver as to unclaimed dividend, 976.*

§ 267. *Effect of failure to file claim before second dividend, 976.*

§ 260. **Penalties recovered by receiver.**

All penalties which shall be recovered by any receivers, pursuant to the provisions of this article, shall be deemed a part of the property of the corporation, and shall be distributed as such among its creditors.

§ 261. **Order of payment by receiver.**

The receiver shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows:

1. All debts due by such corporation to the United States, and all debts entitled to a preference under the laws of the United States.

2. All debts that may be owing by the corporation as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

3. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.

4. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

Consolidators' note to section 261. The following provisions of the Revised Statutes, relating to the duties of trustees of insolvent debtors have been omitted as inapplicable:

"They shall distribute the residue of the monies in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:

"1. In the case of proceedings under the first article of the title, among those who were creditors at the time of issuing the first warrant of attachment:

"2. In proceedings under the third and fifth articles of this title, among those who were creditors at the time of the execution of the assignment by the insolvent:

"3. In proceedings under the fourth article, when an assignment was executed by any officer as therein directed among those who were creditors at the time of the first publication of notice to creditors to appear and determine whether they will unite in a petition; and when the assignment was voluntary among those who were creditors at the time of the execution thereof:

"4. In proceedings under the sixth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 33.

"If they shall have appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 30.

§ 9. **Payment of wages by receiver.**

Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such partnership or corporation shall be preferred to every other debt or claim. Labor Law (Cons. Stat. ch. 31).

§ 262. **Failure to file claim before first dividend.**

Every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before the second dividend,

shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

Consolidators' note to section 262. The following provision of the Revised Statutes has been omitted as superseded by this section:

"Any creditor who shall have neglected to deliver to the trustees on account of his demand, before the first, second, third, or other dividend, and who shall deliver his account to them before the second, or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 41.

§ 263. Second dividend by receiver.

If the whole of the property of such corporation be not distributed on the first dividend, the receivers, shall, within one year thereafter, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week in a newspaper printed in the county where the principal place of business of such corporation was situated.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided.

Consolidators' note to section 263. The following provision of the Revised Statutes has been omitted because superseded by this section:

"If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within one year thereafter, make a second dividend of all the monies belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto, as hereinbefore specified; and in the same manner from year to year, so long as any monies belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 40.

§ 264. Surplus to stockholders.

If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.

Consolidators' note to section 264. The following provision of the Revised Statutes has been omitted as superseded by this section:

"If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 43.

The following provision has been omitted as inapplicable:

"Every debtor who shall be discharged under the third, fourth or fifth articles of this title, shall be allowed the sum of five per cent. on the net produce of all his estate, that shall be received by the assignee, to be paid by him to them in case such net produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained; but the said allowance shall not exceed in the whole, the sum of five hundred dollars." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 44.

§ 265. Disposition of moneys retained by receiver for suits.

When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and

costs, among the creditors and stockholders of the corporation, in the manner as herein directed in respect to a second dividend.

§ 266. Duty of receiver as to unclaimed dividend.

If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the receivers shall consider it as relinquished, and shall distribute it, on any subsequent dividend among the other creditors.

§ 267. Effect of failure to file claim before second dividend.

After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

Chapter 376, Laws of 1885, section 1, provided that where a receiver of a corporation created or organized under the laws of this State and doing business therein other than insurance and moneyed corporations, shall be appointed, the wages of the employees, operatives, and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporations which shall first come to his hands. (This provision is now contained in Labor Law, § 9.) See *People v. Remington & Sons*, 45 Hun, 329, holding that as this statute confers upon a class of persons having a contractual relation with corporations new and unusual privileges and securities which diminish the rights and securities of all persons having claims not within the favored class, it is in derogation of the common law, and it should not be extended to cases not within the reason as well as within the words of the statute; nor should it be given a retroactive effect. That orders drawn on the defendant by laborers requesting the corporation to pay to the person named a certain sum of money and charge the same to the account of the drawer did not effect an assignment of the wages due the drawer, and the payees therein were not assignees of the wages of the laborers or entitled to be preferred under the act. The preference secured by this statute is not a lien upon the property of the corporation, and does not become a legal right until a receiver is appointed. After the appointment of a receiver the preference springs into existence and becomes a legal right which is assignable. Where laborers received promissory notes for labor which were transferred to third parties, no preference was created by the statute. A superintendent employed at an annual salary and an attorney are not preferred within the statute, nor is a person employed upon an annual salary of \$2,000, with a commission of 2 per cent. on goods sold, entitled to a preference. The general word "employees" in chapter 376 of the Laws of 1885 is to be construed as limited by the word "wages" and by the specific words "operatives and laborers," with which it is associated. It comprehends only persons per-

forming the kind of service that is due from the latter; hence the statute does not include employees of a manufacturing corporation, such as bookkeepers, superintendents, and foremen, paid by the month, and performance of manual labor by whom, if performed at all, is merely incidental to their general employment. *Matter of Stryker*, 73 Hun, 327, 55 St. Rep. 903, 26 Supp. 209.

It is said in *People v. Beverage Brewing Co.*, 91 Hun, 313, disapproving *Matter of Stryker*, 73 Hun, 327, *supra*, that the statute should receive liberal construction, and that the word "employee" used in the statute has a wider significance than the words "laborers or operatives."

A person employed to assist the general manager of a corporation in keeping its books and to clean the office and showroom of the corporation, to assist in putting together and taking apart and shipping wire wicket-fence and weaving machines is an employee within the preference of Laws of 1885, chapter 376, and is entitled to preference at the hands of the receiver of the corporation. *Brown v. A. B. C. Fence Co.*, 52 Hun, 151, 23 St. Rep. 415, 5 Supp. 95, following *Gurney v. Atlantic R. R. Co.*, 58 Hun, 358, *dist'g Krauser v. Ruckel*, 17 Hun, 463; *Dean v. DeWolf*, 16 Hun, 186; *Hill v. Spencer*, 61 N. Y. 274; *Wakefield v. Fargo*, 90 N. Y. 213; *People v. Remington*, 45 Hun, 329.

Where the petitioner made articles of machinery for defendant to be paid for at a fixed price for each article, defendant furnishing material, power, tools, etc., while the petitioner hired and paid the laborers who did most of the work, petitioners doing but little work on the machinery, it was held that they were not employees, operatives, or laborers within the statute. *People v. Remington*, 6 Supp. 796, 25 St. Rep. 301, 3 Silver-nail, 478.

In *Palmer v. Van Santvoord*, 17 App. Div. 194, 79 St. Rep. 354, 45 Supp. 354, it is held that a person employed by a mowing and reaping machine manufacturing corporation, setting up its machines and taking them down to repair them, to go from place to place and set them up for farmers and to unpack and repack them, although also employed by the corporation to sell its machines, is entitled to a preference under the statute; *aff'd*, 153 N. Y. 612, holding that the purpose of the act of 1885 is that the debts of the corporation for the wages of employees, including in the designation all who in common understanding held that relation to the corporation, should be the first charge on the assets. It seems that bookkeepers or persons employed to make sale of merchandise, or of property manufactured by the corporation, are "employees" within the meaning of the act, and that their compensation earned is "wages," whether such persons are employed by the day, month, or year, and whether the

compensation is designated "salary" or "wages" in the contract of employment.

In *Matter of Accounting of Scott as Assignee, etc.*, 148 N. Y. 588, it was held that the preference granted to wages of employees, by the General Assignment Act, was not nullified by the fact that the assignor had given the employee a promissory note for the amount of his wages, and that the preference granted under the General Assignment Act includes wages and salaries actually owing to former employees of the assignor at the time of the execution of the assignment, and is not limited to the wages and salaries of those in his employ at that time.

In *Chapman v. Chumar*, 26 St. Rep. 473, 7 Supp. 230, 4 Silvernail, 199, it was held that the bookkeeper of a manufacturing corporation is a servant within section 18, chapter 40, Laws of 1848. An application to authorize the receiver of an insolvent corporation in proceedings for dissolution, to pay, as a preferred claim, out of the fund in his hands a reasonable allowance to counsel employed by the corporation for services rendered in the defense of the proceeding, is properly denied when it appears that by reason of the actual insolvency of the corporation, known to its officers, and of their attempt to continue it in business by fraudulent means, the employment of counsel to resist the proceeding was unjustifiable, although the counsel may have acted in good faith, and stopped the defense on discovering that the corporation was insolvent. *People v. Commercial Alliance Life Ins. Co.*, 148 N. Y. 563, aff'g 91 Hun, 389, 36 Supp. 248, 70 St. Rep. 823. A traveling salesman on a yearly salary is an employee within the meaning of the statute giving a preference to the wages of employers and others. *Matter of Fitzgerald*, 21 Misc. 226, 45 Supp. 630. A traveling salesman who receives commissions on his sales as wages is an "employee" within the meaning of that term as used in section 1 of chapter 899, Laws of 1895, and is entitled to a preference in payment. *Mayor v. Stern*, 22 App. Div. 628, 47 Supp. 965, 81 St. Rep. 965.

A salesman employed by a corporation as an employee, where his compensation consists in part of a specified salary and in part of commissions, is entitled to preferential payment of both from the receiver. *Matter of Luxton & Black Co.*, 35 App. Div. 243, 54 Supp. 778.

The word "employees" in chapter 376, Laws of 1885, giving a preference to wages of "employees, operatives, and laborers" in case a receiver of a corporation is appointed, is limited by the specific words "operatives and laborers," and does not include a clerk and bookkeeper of a manufacturing corporation, the superintendent, foreman, or draftsman, who receives salaries. *Matter of Stryker*, 158 N. Y. 526, aff'g 73 Hun, 327, 55 St. Rep. 903, 26 Supp. 209.

The claim of a manager of a corporation for wages is not entitled to a preferential payment by a receiver of such corporation. *Matter of American Lace Works*, 30 App. Div. 321, 51 Supp. 818.

A bookkeeper is not an employee within the meaning of chapter 415, Laws of 1897, and is not entitled to preference in payment by the receiver. *Cochran v. A. S. Baker Co.*, 30 Misc. 48, 61 Supp. 724.

A contractor with a corporation is not an employee so as to be entitled to a preference in case of insolvency. *Matter of Charron v. Hale*, 25 Misc. 34, 54 Supp. 411.

The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*; and such a creditor will not be entitled to such preference, or to call upon holders of receivers' certificates, who have been paid part of their claim, to contribute to make him equal with them, on the ground that, although not holding such certificates, his claim consists of a loan to the corporation of money used in paying debts of a character for which receivers' certificates were subsequently authorized to be issued, by a judgment which declared that such certificate should be a first lien on the mortgaged property. *Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co.*, 148 N. Y. 315.

Where a receiver was required to operate a railroad, keep up repairs, and pay for the same out of the income with no provision for the payment of outstanding debts incurred for current expenses, it was held he was not bound to give a preference to employees. *Franklin Trust Co. v. Northern Adirondack R. R. Co.*, 11 App. Div. 249, 42 Supp. 211, 76 St. Rep. 211.

The proceeds of the property of a corporation in the hands of the receiver appointed in proceedings for its dissolution are properly applied to the payment of wages of employees due at the time the receiver was appointed, and wages of employees whose services were thereafter required in preserving the property and preparing it for sale as well as referee's fees, counsel fees, and expenses, including those of the receiver's attorney, and the money due on receiver's certificate authorized by the court. *Matter of Muller & Co.*, 47 Supp. 277.

Section 2430 of the Code is similar to section 71 in 2 Revised Statutes, 469; and it was held in *Sands, Receiver v. Hill*, 55 N. Y. 18, that the word "transfer," in that statute, means a passing over to another of an existing right to the thing transferred, which right shall survive the transfer. It does not include, and the inhibition of the statute does not apply, to the extinguishment or satisfaction of a chose in action, either by payment in full or by part payment which is taken in full satisfaction. It seems it was not the object of the section to debar the corporation from

collecting debts due it, but it was intended to prohibit transactions designed to favor one or more creditors, or to give them a preference over others. The rule that insolvent corporations cannot, directly or indirectly, prefer their creditors, is reiterated in *Smith v. Danzig*, 64 How. 320; and *Harris v. Thompson*, 15 Barb. 62, and *Sibell v. Remsen*, 33 N. Y. 95, are cited in support of the proposition.

ARTICLE X.

CONTROL OF, AND FINAL ACCOUNTING, BY RECEIVER. §§ 227, 268-272, 276.

§ 227. *Notice to securities upon accounting*, 980.

§ 268. *Final accounting by receiver*, 981.

§ 269. *Notice of final accounting*, 981.

§ 270. *Hearing on final accounting*, 981.

§ 271. *Reference on final account*, 981.

§ 272. *Further accounting*, 981.

§ 276. *Control of receiver by court*, 980.

§ 276. Control of receiver by court.

The receivers shall be subject to the control of the court and may be compelled to account at any time.

Consolidators' note to section 276. The following provisions of the Revised Statutes have been omitted as superseded by this section:

"Such trustees shall be subject to the order of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 46.

"Whenever any authority shall be exercised by a court of common pleas, or any officer, pursuant to any provisions of this title, the proceeding may be removed into the supreme court by certiorari, and there examined and corrected. But no such certiorari shall issue, unless allowed by a justice of the supreme court, or a circuit judge; nor shall it operate as a stay of proceedings, unless it shall be so directed in the order of allowance." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 47.

The following provisions of the Revised Statutes have been omitted because inapplicable:

"Any person who shall discover to the trustees any secreted effects, property, or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate, on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor; but this section shall not extend to persons who have such property, effects or things, in their own possession." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 18.

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 30.

§ 227. Notice to sureties upon accounting.

A receiver who, having executed and filed a bond as provided for in section two hundred and twenty-five or section two hundred and twenty-six of this chapter, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's account be passed, settled or allowed, unless the said notice provided for in this section shall have first

been given to the surety or sureties on the official bond of such receiver. (Added by L. 1909, chap. 240, § 40, in effect April 22, 1909.)

§ 269. Notice of final accounting.

Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in a newspaper of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered. Said receivers shall also give notice to the sureties on their official bonds, as provided in section two hundred and twenty-seven of this chapter. (Thus amended by L. 1909, chap. 240, § 42, in effect April 22, 1909.)

§ 270. Hearing on final accounting.

Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation.

§ 271. Reference of final account.

The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

§ 272. Further accounting.

Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

§ 268 (Formerly Code, § 2431b). Final accounting by receiver.

A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Consolidators' note to section 268. This section supersedes the provisions of the Revised Statutes given below since it provides that "the receiver is not required or authorized to file any account except as herein provided except by special order of the court."

"Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery, on oath, which shall be referred to a master to examine and report thereon." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 86.

"Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the court of common pleas of the county in which they reside, or with a clerk of the supreme court, an account in writing of all their proceedings in the premises stating:

"1. Their disbursements, commissions and the dividends made by them.

"2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them.

"3. The property, monies and effects of the debtor remaining in their hands, and the value and situation of such property:

"And such trustees may at any time be compelled by a rule of the supreme court, or of the court of common pleas of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 45.

Consolidators' note to sections 136, 179, 250, 269, 275. The references in these sections to the "State Paper" and the "newspaper printed at Albany, in which legal notices are required to be published," have been omitted for the reason that the State paper referred to has been abolished and there is no newspaper in Albany in which legal notices generally are required to be published. See Executive Law, section 83, which abolishes the "old" State paper.

A *de facto* receiver cannot avail himself of an irregular or void appointment, under which he has acted, procured by his connivance, and thus escape an accounting for the moneys which came into his hands. *O'Mahoney v. Belmont*, 62 N. Y. 133. Upon the accounting of a receiver of a corporation, where the order for the accounting requires service of notice upon the creditors named in the application, such creditors have a right to appear and be present at the accounting. *Greason v. Goodwillie Wyman Co.*, 38 Hun, 138. The receiver should keep the trust funds separate or he will be charged with interest. *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *In re Commonwealth Ins. Co.*, 32 Hun, 78. If he exercise his best judgment, in the investment of funds, he will not be charged for losses. *Hynes v. McDermott*, 3 St. Rep. 582. Where, upon the examination of the accounts of a receiver, no misconduct is shown, he will not be chargeable with costs. *Hynes v. McDermott*, 3 St. Rep. 582. A receiver's charges, in his account of expenditures, must be reasonable, and what is reasonable is for the court to determine. *Beach on Receivers*, § 749. If, during the pendency of proceedings instituted for an accounting by the receiver of a corporation, one of the receivers die, the court may make an order reviving and continuing the accounting against his representatives. *Matter of Foster*, 7 Hun, 129; *Matter of Columbia Ins. Co.*, 30 Hun, 342. A master's report upon a receiver's account need not be confirmed and cannot be excepted to. If a party be dissatisfied he should ask leave of the court to review the principle upon which the account is taken. *Brower v. Brower*, 2 Edw. 621. Where it is sought to review proceedings had upon the settlement of a receiver's account by a creditor, he should apply to be made a party to the action and to have the order vacated. *Schenck v. Ingraham*, 4 Hun, 67, 5 Hun, 397. Chapter 378, Laws of 1883, requiring the accounts of the receiver of an insolvent company to be filed with the General Term of the Supreme Court, to pass upon their correctness, or to determine whether or not they should be approved, requires nothing more than that they shall be placed upon the files of the court. Where the accounts so filed embrace many items, as paid to attorneys and counsel, the correctness of which the court cannot determine from a mere

inspection of the account, it will appoint a referee to determine whether the services have been rendered, and whether the charges made therefor are just and proper, notice of the hearing before him being required to be given to the Attorney-General and to the receiver. *People v. Knickerbocker Life Ins. Co.*, 31 Hun, 622. Where the attorney of the receiver was his partner and made the application upon his own petition without notice, it was held that the order granting compensation might be attacked collaterally. *Matter of Commonwealth Fire Ins. Co.*, 32 Hun, 78. Where the receiver makes unauthorized loans, but charges himself with the interest received, he will not be charged a greater sum. *Attorney-General v. North Am. Life Ins. Co.*, 89 N. Y. 94.

The accounts of a receiver shall be filed and presented to the court before reference is granted to pass upon such accounts. *People of State of New York v. Columbia Car Spring Co.*, 12 Hun, 585.

Where, upon the accounting by the receiver of an insolvent insurance company, it appears that he has deposited a portion of the trust funds in his own private bank account, the contestants may prove what amounts he has from time to time drawn out upon his individual checks for his own purposes, in order that he may be charged with interest upon any of the trust funds so used. *Matter of Commonwealth Fire Ins. Co.*, 32 N. Y. 78.

A final order of court in a receivership, discharging the receiver and directing the disposition of the funds in his hands, is binding on all the creditors until directly attacked and set aside. *Ferguson v. Toledo, A. A. & N. M. R. R. Co.*, 85 App. Div. 352, 83 Supp. 283.

Code of Civil Procedure, section 715, requires a receiver, before presenting his accounts, to give notice to the surety on his official bond before the day set for the hearing on said accounting. The same notice must be given to such surety where the accounting is ordered on the petition of any other person, and in no case shall receiver's accounts be allowed, unless the said notice shall have first been given to the surety. *Held*, that, where no notice is given to the surety of the accounting, no action can be maintained against him on his bond as a statutory obligation. *Stratton v. City Trust, Safe Deposit & Surety Co.*, 86 App. Div. 551, 83 Supp. 780.

ARTICLE XI.

COMMISSION AND EXPENSES OF RECEIVER. Code § 3320; Gen. Corp. Law, §§ 255, 277, 278.

§ 3320, Code. Receiver's commissions; cost of bonds; trustees' commissions, 983.

§ 255. Deduction of disbursements and commissions by receiver, 984.

§ 277. Commissions and expenses of receiver in voluntary dissolution, 984.

§ 278. Commissions and expenses of receiver except in voluntary dissolution, 984.

§ 3320. Receiver's commissions; cost of bonds; trustees' commissions.

A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum

upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may, in its or his discretion, allow said receiver such sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section one hundred and eleven of the real property law or under section twenty of the personal property law required by law to give a bond as such may include as a part of his necessary expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. * * *

§ 255. Deduction of disbursements and commissions by receiver.

Out of the moneys in their hands the receivers may first deduct all the necessary disbursements made by them in the discharge of their duty and such commissions as may be allowed by law.

Consolidators' note to section 255. The commissions of receivers of corporations are no longer regulated by this section of the Revised Statutes, but by sections 280 and 281 of this chapter. Hence the omission of the bracketed matter in section 255 and the insertion of the words, "and such commissions as may be allowed by law." Section 3320 of the Code of Civil Procedure has not been inserted in this article for the reason that it provides for the expenses and commissions of receivers not otherwise provided for.

§ 277 (Formerly Code, § 2431a). Commissions and expenses of receiver in voluntary dissolution.

A receiver appointed pursuant to article nine is entitled, in addition to his necessary expenses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

Consolidators' note to section 277. Section 3320 of the Code of Civil Procedure has not been consolidated in this chapter for the reason that it provides for the expenses and commissions of receivers except as otherwise specially prescribed by statute.

The following provision of the Revised Statutes was expressly repealed by chapter 349 of the Laws of 1906:

"Such receivers shall, in addition to their actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 76.

The following provision of the Revised Statutes is omitted as embraced within the language of section 76 of the Revised Statutes:

"And a commission at the rate of five per cent. on the whole sum which shall have come into their hands." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 29.

§ 278. Commissions and expenses of receiver except in voluntary dissolution.

A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled, in addition to his necessary expenses, to such commissions, not exceeding two and one-half per centum upon the sums received and disbursed by him, as the court by which or the judge by whom he is appointed allows, but except upon a final accounting such a receiver shall not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate. Upon final accounting, the court may make an additional allowance to such receiver, not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that

he has performed services that fairly entitle him to such additional allowance. Where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers.

The statute, section 277, as it now stands, is a re-enactment of section 2431a of the Code, first enacted by chapter 293 of Laws of 1906, and relates entirely to receivers appointed in proceedings for voluntary dissolution. The provisions as to commissions and expenses of receivers of corporations except on voluntary dissolution are found in section 278. Very many of the decisions relative to commissions relate to questions which are common to both sections and to all receiverships of corporations, permanent or temporary; hence, they are all collated in this connection.

Where a receiver appointed in proceedings for the voluntary dissolution of a corporation has disbursed \$28,000 without taking vouchers, and his account is objected to by a creditor, the court has authority, under the Code, section 2429, and Laws of 1880, chapter 245, to appoint a referee to take and state the account. *Matter of Home Book Co.*, 60 Misc. 560, 112 Supp. 1012.

When the accounts of receiver involve large sums they should be scrutinized according to long established practice by a referee before being passed by the court. *People v. Oriental Bank*, 129 App. Div. 865, 114 Supp. 440.

The expenses of proceedings instituted for the voluntary dissolution of a corporation, which has issued first mortgage bonds, and the fees of the temporary receiver, may be made a first charge to be paid by the permanent receiver. *Matter of New Paltz & Wallkill Valley R. R. Co.*, 27 Misc. 451, 59 Supp. 247; aff'd, 42 App. Div. 622, 59 Supp. 1111.

A permanent receiver appointed in proceedings for the voluntary dissolution of a corporation is entitled to commissions upon the moneys actually received and disbursed by him by order of the court, without deducting for moneys paid to persons claiming an interest in the fund, or in settlement of claims against him as receiver, or in satisfaction of liens upon the property of the corporation. *Matter of Little*, 47 App. Div. 22, 62 Supp. 27; aff'd, 165 N. Y. 643.

The report of the referee on an accounting of a receiver should not grant an allowance to the attorney of the receiver for services on the accounting, but the attorney should apply for counsel fee on the entry of the final order. *Matter of Little*, 47 App. Div. 22, 62 Supp. 27; aff'd, 165 N. Y. 643.

The amount of a commission of a temporary receiver appointed on an application for the voluntary dissolution of a corporation is governed by section 3320 of the Code of Civil Procedure. Section 76 of chapter 8 of part 3 of the Revised Statutes applies only to permanent receivers.

Such commissions are not to be computed simply upon the cash which actually comes into the hands of the temporary receiver, appointed under section 2423 of the Code of Civil Procedure, but he may be entitled, in an extreme case, to 2½ per cent. of the value of the property coming into his hands for receiving and protecting the same, such amount to be determined and allowed by the court. *Matter of Smith Co.*, 31 App. Div. 39, 52 Supp. 877.

The people, represented by the Attorney-General, and the receiver and his attorney being the only parties to a reference for the purpose of fixing the compensation of the receiver and his attorneys in a proceeding by the people against an insolvent bank, the Special Term cannot reduce the amount stipulated by the parties for such compensation. *People v. Federal Bank of N. Y.*, 114 App. Div. 374, 100 Supp. 44; *Matter of Schlesinger*, 114 App. Div. 374, 100 Supp. 44.

A court holding the funds of a corporation by its receivers is not bound to allow the commissions agreed upon between the receivers and the directors of the corporation. *People v. Knickerbocker Trust Co.*, 127 App. Div. 217, 111 Supp. 2.

Where on a motion to discharge temporary receivers of a corporation, for an accounting, and for permission to resume business, all parties are before the court, it has jurisdiction to determine the compensation of the receivers as part of the accounting. A separate proceeding for that purpose is not necessary or proper.

Where temporary receivers of a trust company have served only five months, an allowance to them and their counsel of \$75,000 each is grossly excessive and should be reduced to \$20,000 each.

The fact that the officers of the trust company consent to the larger amount and urge its allowance does not preclude the court, nor is the Attorney-General entitled to produce evidence of the value of the services of the receivers and their counsel, nor is a reference for that purpose necessary. *People v. Knickerbocker Trust Co.*, 127 App. Div. 215, 111 Supp. 2.

The court has no power to allow a receiver compensation in addition to the 5 per cent. allowed by the statute. *Matter of Orient Mutual Ins. Co.*, 50 St. Rep. 460, 21 Supp. 237. The necessary expenses of administration, including the fees of the receiver, constitutes a first lien on the funds in his hands even on property attached prior to his having been appointed receiver, where the attaching creditors have been made parties to a proceeding in which an order is made to turn over the attached property to the receiver. *Matter of Atlas Iron Constr. Co.*, 19 App. Div. 415, 46 Supp. 467. A receiver who is warranted in bringing an action to set aside a chattel mortgage and in appealing from the judgment, through un-

successful is entitled to be allowed the expenses and costs incurred by him. *Matter of Merry*, 11 App. Div. 597, 42 Supp. 617, 76 St. Rep. 617. A receiver is entitled to have his commissions calculated and allowed upon the final settlement and disposition of his account. *Matter of Security Life Ins. Co.*, 31 Hun, 36. In determining the amount of the receiver's commissions the court will take into consideration the manner in which he has managed the trust fund. *Matter of Commonwealth Fire Ins. Co.*, 32 Hun, 78. Although receivers selling property subject to incumbrance upon it are not entitled to commissions upon the amount of the incumbrance, yet this rule does not apply to a case where the receiver pays off the incumbrance and sells the property free and clear from it. *Matter of Security Life Ins. Co.*, 31 Hun, 36. Neglect, inattention, and misconduct resulting in probable loss are a ground for refusing to award commissions to a receiver. *Clapp v. Clapp*, 49 Hun, 195, 17 St. Rep. 39, 125 N. Y. 693. Upon a receiver's accounting he cannot be allowed commissions and also a sum for his services. *Hynes v. McDermott*, 3 St. Rep. 582, 14 Daly, 104. Where a firm held a mortgage upon a vessel, which mortgage was foreclosed by the receiver of the firm and the vessel bought in, it was held that the receiver was entitled to his commissions on the money in his hands which he employed in the purchase. *Brett v. Brett*, 4 St. Rep. 704. Where a receiver had paid money under an order which was reversed, it was held to be error to require payment of the commission and expenses of the receiver. *Willis v. Sharp*, 124 N. Y. 406, 36 St. Rep. 417, modifying 35 St. Rep. 329, 12 Supp. 120. Upon the settlement of the receiver's accounts there is no authority for granting an extra allowance, where the action has not been determined and there has been no award of costs. *Hanover Ins. Co. v. Germania Ins. Co.*, 46 Hun, 308, 11 St. Rep. 481. A receiver of a corporation will be directed to pay costs awarded against him in an action originally brought against the corporation, where such costs were incurred for the benefit of the fund, and all preferred claims have been paid. *Locke v. Covert*, 42 Hun, 484, 12 Civ. Pro. 31.

Where a receiver does not take possession or control of the property and allows the business to proceed as before under the management of parties in interest who receive and disburse the fund with his assent and approval, he is not entitled to a percentage on such moneys. *Matter of Woven Tape Skirt Co.*, 85 N. Y. 506. In case of change of receivers by death or otherwise, one-half of the percentage on moneys in the hands of the first receiver should be allowed to each. *Attorney-General v. Continental Life Ins. Co.*, 32 Hun, 223. The court has no power to make any allowance to interveners out of funds in the hands of a receiver for counsel fees. *Matter of Attorney-General v. North Amer. Life Ins. Co.*, 91 N. Y. 57; *Attorney-General v. Continental Life Ins. Co.*, 31 Hun, 623. Nor

will any allowance be made to counsel retained by the Attorney-General to appear in an action in which the receiver was appointed. *Attorney-General v. Continental Life Ins. Co.*, 88 Hun, 571.

It was held on the final accounting of the receiver of an insurance company, who had received its securities from the Insurance Department for distribution among the policy-holders and applied proceeds in the first instance to the expenses of the receivership, that he was protected on his final accounting in respect to his expenditures by the orders made upon his intermediate account. *People v. U. S. Mutual Accident Assoc.*, 88 App. Div. 597, 85 Supp. 137.

Commissions will not be allowed a receiver upon money merely turned over to him by his predecessor in office; such funds, when they come into the second receiver's hands, are to be regarded as *in custodia legis*. *Attorney-General v. Continental Life Ins. Co.*, 32 Hun, 223. In computing the commissions of the receiver of a corporation upon accepting his resignation, only the amount of money which has actually come into his hands should be considered as a basis of computation. *People v. Mutual Benefit Assoc.*, 39 Hun, 49.

Where a receiver was never entitled to receive all the money in question, and the order directing payment to him was erroneous and reversed, it was held that the court had no discretion to permit the receiver to retain a sum to cover his commissions and counsel fees. *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321.

Where the conduct of a receiver rendered a reference necessary to examine his accounts, he was charged with one-half the expense of this examination. *Corey v. Long*, 43 How. 492. But ordinarily the receiver will not be compelled to pay the costs of a reference to settle his accounts. *Attorney-General v. Continental Life Ins. Co.*, 27 Hun, 524; *aff'd*, 93 N. Y. 45. He will be allowed his reasonable expenses, including counsel fees. *Matter of Commonwealth Fire Ins. Co.*, 32 Hun, 78; *Clapp v. Clapp*, 49 Hun, 195; *Corey v. Long*, 43 How. 492; *Utica Life Ins. Co. v. Lynch*, 2 Barb. Ch. 573. A receiver may not charge counsel fees for himself. *Matter of Bank of Niagara*, 6 Paige, 213; *Collier v. Munn*, 41 N. Y. 147. A receiver may appeal from a determination settling his accounts. *Matter of Guardian Savings Inst.*, 78 N. Y. 408.

The matter of accounting by receivers of corporations formed for banking or insurance is governed by Laws of 1902, chapter 60; as a matter of procedure the provision is properly applicable to all receivers of such corporations, though appointed prior to the enactment. *People v. Manhattan Fire Ins. Co.*, 77 App. Div. 517, 79 Supp. 11.

An accounting by a temporary receiver of a corporation is not conclusive, as against creditors, on his accounting as permanent receiver. *Matter of Simonds Mfg. Co.*, 39 App. Div. 576, 57 Supp. 776.

Upon the accounting of a receiver objection was made to the allowance of three claims, of \$5,000 each, paid by the receiver to his counsel, who was also his partner, in pursuance of orders of the Special Term. The first order was obtained upon the petition of the receiver, the motion being made by the counsel. The other two were obtained upon the motion of the counsel and upon petitions made and verified by them.

Held, that as no appeal had been taken from the first order it could not be questioned upon the accounting.

That the other two orders could, under the circumstances of the case, be collaterally assailed, and that it rested upon the receiver to establish by other satisfactory evidence that the payments made thereunder were justified by the services actually rendered to him by the counsel. *Matter of Commonwealth Ins. Co.*, 32 Hun, 78.

ARTICLE XII.

REMOVAL, VACANCY, AND RENUNCIATION OF RECEIVER. §§ 226, 273-275, 311.

§ 226. *Removal or new bond*, 989.

§ 273. *Removal of receiver*, 989.

§ 274. *Vacancy*, 990.

§ 275. *Renunciation by receiver*, 990.

§ 311. *Application by Attorney-General for removal of receiver and to facilitate closing affairs of receivership*, 989.

§ 226 (Formerly Code, § 715, in part). Removal or new bond.

The court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same or for removing a receiver. (Added by L. 1909, chap. 240, § 40, in effect April 22, 1909.)

§ 273. Removal of receiver.

Such receivers may be removed by the court.

Consolidators' note to section 273. The following provision of the Revised Statutes has been omitted as superseded by this section:

"And they may be removed by the Supreme Court, for cause shown." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 46.

§ 311. Application of attorney-general for removal of receiver and to facilitate closing affairs of receivership.

The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policy-holders, depositors, or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof in any judicial district:

1. For an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or,
2. To compel him to account, or,
3. For such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and

Any appeal from any order made upon any motion under this section shall be to the appellate division of the department in which such motion is made.

§ 274. Vacancy.

Any vacancy created by removal, death or otherwise, may be supplied by the court.

Consolidators' note to section 274. The following provision of the Revised Statutes has been omitted, having been incorporated in this article:

"Whenever any trustee shall be removed, die, or shall become incapacitated to perform his duties, the officer who originally appointed such trustee, or in case of his absence, death, or removal, any other officer residing in the county where such trustee was resident, who by law would have been empowered to make such appointment after giving notice, and an opportunity to the creditors to propose proper persons, may appoint another in the place of each trustee, or shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded as the original appointment was required to be recorded." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 48.

§ 275. Renunciation by receiver.

A receiver who shall be desirous of renouncing the trust vested in him, may apply to the court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

Such application shall be accompanied by a full, true and just account of all the transactions of such receiver, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and property of the corporation, in respect to which he was appointed receiver, within his knowledge, and the situation of the same.

To such account shall be annexed the affidavit of the receiver that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the court, to whom the application is made, and shall be certified by the clerk of the court.

Such court shall thereupon grant an order, directing notice to be given to all persons interested in the property of the corporation, in respect to which such receiver was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Such notice shall be published, once in each week, for six weeks successively in such newspapers, as such court shall direct.

On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

If it shall appear that the proceedings of such receiver, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied that for any reason it is inexpedient for such receiver to continue in the execution of the duties of his appointment, and that such duties can be executed by another receiver, without injury to the property of the corporation, or to the creditors; and if no good cause to the contrary appear, such court shall grant an order, allowing such receiver to renounce his appointment.

Upon such order being granted, such receiver shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

The expense of all proceedings in effecting such renunciation shall be paid by the receiver making the application.

Consolidators' note to section 275. The following provisions of the Revised Statutes have been omitted as inapplicable:

"If the officer who made such appointment shall not then be in office, such application may be made to a circuit judge, Supreme Court commissioner, or the first judge of the county, residing in the same county where the appointment of such assignee was made."

"Such assignment shall be executed by such trustee, to such person, or persons, as the court or officer shall appoint for that purpose; and in the appointment, such

person as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer."

"Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustee so renouncing; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee; and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee."

"Upon producing to the officer or court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery, belonging to such debtor, together with all the books, vouchers, and documents, relating to the estate of such debtor has been duly delivered; and also a certificate of the county clerk, that such assignment has been recorded; such court or officer shall grant to the trustee so applying, an order that he be discharged from his trust."

"Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office where the original papers and proceedings, in respect to such debtor, were filed." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, §§ 50, 57, 58, 59, 61.

Rule 80 provides that no motion can be made or other proceeding had for the removal of receiver elsewhere than in the judicial district in which the order for his appointment was made.

A receiver appointed in an action against a corporation should not be removed without notice of the application having been given to the plaintiff in the action at whose instance he was appointed. He cannot be removed in an application made in another district from that in which he was appointed. *Attrill v. Rockaway Beach Improvement Co.*, 25 Hun, 376, s. c., 25 Hun, 500. The power of the court to remove the receiver of a corporation does not depend on any notice to stockholders who have appeared. The court can act on its own motion *ex parte*. *Hoyt v. Continental Ins. Co.*, 21 Wkly. Dig. 145. Where a motion is made to vacate an order appointing a receiver on the ground that another receiver has been appointed, it is error, on denying such motion, to remove the second receiver and appoint another on grounds not stated in the moving papers. *Bruns v. Stewart Mfg. Co.*, 31 Hun, 195. Where a director of a company was appointed receiver, and it afterward appeared he had been connected with its management, he was removed. *Keeler v. Brooklyn El. R. R. Co.*, 9 Abb. N. C. 166.

A receiver may be removed in the sound discretion of the court. *Seney v. N. Y. Consol. Stage Co.*, 28 How. 481, 18 Abb. 435; *Ferry v. Bank of Central N. Y.*, 15 How. 445; *Wilson v. Barney*, 5 Hun, 257. It was held error for a Special Term sitting in Albany to remove the receiver of a corporation appointed in an action the venue of which was laid in the county of New York. *Attrill v. Rockaway Beach Improvement Co.*, 25 Hun, 376.

The duties of a temporary receiver terminate with a judgment adverse to the party who procures his appointment, but he is not wholly discharged, remaining amenable to the court for the purpose of accounting. *Whiteside v. Prendergast*, 2 Barb. Ch. 471; *McCosker v. Brady*, 1 Barb. Ch. 329; *Ireland v. Nichols*, 40 How. 87; *Colwell v. Garfield National Bank*, 119 N. Y. 412. As to what are sufficient grounds for removal, see *Bank of Monroe v. Schermerhorn*, 1 Clarke's Ch. 366; *Wetter v. Schlieper*, 7 Abb. 92; *Keeler v. Brooklyn El. R. R. Co.*, 9 Abb. 166; *Wilson v. Barney*, 5 Hun, 257.

Where the appointment and subsequent conduct of a temporary receiver of a railroad corporation were satisfactory to all parties in interest, except one claiming to be a majority bondholder, he will not be removed, where title of the objecting party to the bonds was contested by the receiver, and the bonds were claimed to belong to the corporation itself. *Townsend v. Oneonta, C. & R. S. Ry. Co.*, 41 Misc. 298, 84 Supp. 119; *aff'd*, 86 App. Div. 604, 83 Supp. 1034.

Refusal to vacate an order appointing a receiver, on the ground of want of qualifications and fitness, is proper, the order to show cause not being based on papers attacking the fitness, and he not being apprised of the charges till the hearing. *Townsend v. Oneonta, C. & R. S. R. Co.*, 86 App. Div. 604, 83 Supp. 1034; *Attorney-General of N. Y. v. Jennings*, 86 App. Div. 604, 83 Supp. 1034.

A receivership vests in the court the assets of the insolvent estate. A receiver is but an officer and agent of the court, subject to its control and direction in all matters pertaining to the trust. The primary object to be accomplished is the conservation of the rights of the creditors and others whose interests are or may be impaired because of the financial calamity which has overtaken the corporation. These rights and interests are paramount to those of the receivers and their counsel. If the latter cannot subordinate their personal views to such paramount rights the court will see to it that the receivership is changed in order to accomplish such a result. Where receivers become hostile a court could and should intervene to remove them and appoint others. *People v. Brooklyn Bank*, 125 App. Div. 354, 109 Supp. 534, citing *Shirk v. Brookfield*, 77 App. Div. 295 (301).

ARTICLE XIII.

GENERAL MATTERS OF PRACTICE. §§ 250-254, 313, 314, 316.

- § 250. *Duty of receiver to give notice to creditors*, 993.
- § 251. *Delivery of property and payment of debts to receiver after notice*, 993.
- § 252. *Penalty for concealing property from receiver*, 993.
- § 253. *Duty of receiver to call creditors' meeting*, 994.
- § 254. *Proceedings at creditors' meeting*, 994.
- § 313. *Designation of depositories of funds in order appointing receiver*, 993.
- § 314. *Application to the court in certain actions and proceedings*, 993.
- § 316. *References in actions or proceedings by or against receivers*, 993.

§ 314. Application to the court in certain actions and proceedings.

All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

§ 313. Designation of depositories of funds in order appointing receiver.

All orders appointing receivers of corporation shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursements shall be deposited and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

§ 316. Preferences in actions or proceedings by or against receivers.

All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings by the people of the state of New York.

§ 250. Duty of receivers to give notice to creditors.

The receivers immediately upon their appointment, shall give notice thereof which shall be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated; and therein shall require,

1. All persons indebted to such corporation, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such receivers and to pay the same.

2. All persons having in their possession any property or effects of such corporation to deliver the same to the said receivers by the day so appointed.

3. All the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

4. All persons holding an open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified.

Consolidators' note to section 250. The following provisions of the Revised Statutes relating to powers, duties and liabilities of trustees of insolvent debtors are inapplicable and therefore have been omitted:

"In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made; and in the case of non-resident, absconding or concealed debtors, it shall be published, for the same time, in the newspapers in which the notice of an attachment having issued, is directed to be printed." Revised Statutes, pt. 2, chap. 5, tit. 1, art. 8, § 9.

"Held, that the provisions of 2 Revised Statutes, 469, sections 70 and 72, to the effect that receivers immediately after their appointment shall give a certain notice, do not apply to a temporary receiver." *Nealis v. American Tube & Iron Co.*, 76 Hun, 220.

For omission of reference to "State Papers" see note 20a.

§ 251. Delivery of property and payment of debts to receiver after notice.

After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers.

§ 252. Penalty for concealing property from receiver.

Every person indebted to such corporation, or having the possession or custody of any property or thing in action, belonging to it, who shall conceal the same, and not

deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the receivers, or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed; which penalties may be recovered by the receivers.

Consolidators' note to section 252. This provision was contained in chapter 5 of the Revised Statutes (pt. 2, tit. 1, art. 8) and is made applicable by section 72 of chapter 8 of the Revised Statutes (pt. 3, tit. 4, art. 3).

§ 253. Duty of receiver to call creditors' meeting.

They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

Consolidators' note to section 253. The provisions made applicable by the following section of the Revised Statutes have been incorporated in this article, and the following provision therefore has been repealed:

"The receiver shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be herein made." Revised Statutes, pt. 3, chap. 8, tit. 4, art. 3, § 74.

§ 254. Proceedings at creditors' meeting.

At such meeting, or other adjourned meeting thereafter, all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

After the appointment of a permanent receiver of a corporation, in an action brought by the State for its dissolution, the Attorney-General is entitled to a notice of motion for a referee to hear and determine a disputed claim. *Matter of Eustace v. N. Y. Building-Loan Assoc.*, 98 App. Div. 97, 90 Supp. 784.

It is held in that case that the question involved did not necessarily arise in *People v. American Steam Boiler Ins. Co.*, 3 App. Div. 504, although the judge writing the opinion in that case expressed his views upon the subject. The court says (page 99): "But such concurrence by no means involved an adoption of all that was said in the opinion, as it appears upon the face of the opinion that it was decided upon another ground. Such an enunciation of the law is of no weight in this case, as the question now presented was not properly before the court in that case, and what was said about it was entirely *obiter*." Citing to that point *Crane v. Bennett*, 177 N. Y. 106; *Stokes v. Stokes*, 155 N. Y. 581; *Robinson v. Rochester Folding Box Co.*, 171 N. Y. 538.

The appointment of receivers of a corporation does not deprive its officers of the right to continue the defense of an action where there is no restraining order, and the receivers have no standing, unless made parties, to move to set aside the answer interposed, and judgment entered thereon and for leave to answer. *Farmers' Loan & Trust Co. v. Hoffman House*, 7 Misc. 358, 27 Supp. 634, 58 St. Rep. 684. A receiver in possession of property

claimed by many persons on the ground that the vendees had procured it by fraud was properly directed to sell all the goods and hold the proceeds subject to the order of the court. *Nat. Park Bank v. Goddard*, 62 Hun, 31, 41 St. Rep. 439, 16 Supp. 343.

A general assignee of a corporation, not a party to proceedings in which a receiver was appointed, cannot be ordered to surrender assets to the receiver. *Matter of Muehlfeld*, 16 App. Div. 401, 45 Supp. 16, 26 Civ. Pro. 265.

An order directing the receiver to sell and convert property into cash, subject to the liens of execution, does not render the judgments and executions valid which would otherwise be invalid. *Rossman v. Seavor*, 22 Misc. 661, 51 Supp. 91; aff'd, 41 App. Div. 603, 58 Supp. 677.

Where the receiver in the proceedings dissolving an insolvent corporation was duly discharged as such receiver by the Supreme Court prior to the commencement of this action, having before his discharge exhausted all the assets of the corporation which came into his hands, which assets were insufficient to pay the debts of the corporation, such receiver is not a necessary party to the action either as a plaintiff or defendant. *Lilienthal v. Betz*, 185 N. Y. 153, rev'g 108 App. Div. 222, 95 Supp. 849.

A receiver of a bank who has been finally discharged cannot be allowed to intervene in proceedings to reach newly-discovered assets. *Matter of Grand Central Bank*, 27 Misc. 116, 57 Supp. 418; aff'd, 42 App. Div. 157, 58 Supp. 1022.

While a statute of another State, continuing dissolved insurance and other corporations for a certain period for the purpose of prosecuting suits by or against them, may render valid and effective a judgment obtained in such State against a corporation of this State after its dissolution here, so far as its property within such other State where it had been doing business is concerned, this State is not required by comity, and will not give to such foreign judgment the effect of reaching the corporate assets held by a receiver in this State as a fund for distribution after the dissolution of the corporation here, when the receiver has not been made a party to the foreign suit so as to be bound by the judgment therein. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34.

Where, pending an action by a stockholder against the corporation and its directors for waste of its assets, in which a receiver was appointed, an election of directors was held and the directors charged with malfeasance are removed, the continuance of the receivership is unauthorized and unnecessary, and creditors who have obtained judgment against the corporation should be permitted to proceed with the collection thereof. *Duncan v. George C. Treadwell Co.*, 82 Hun, 376, 63 St. Rep. 790, 31 Supp. 340. See, also, *Halpin v. Mut. Brew. Co.*, 91 Hun, 220; aff'd, 148 N. Y. 744.

In order to prove the appointment of a receiver it is sufficient to produce the petition, the order appointing him, and his official bond. *Palmer v. Clark*, 4 Abb. N. C. 25.

The costs of an action to which a receiver is a party should be paid in full, and an order may be made for that purpose where costs have been awarded against him. This is true although the action may have been originally brought against the corporation if a receiver has defended. *Locke v. Covert*, 42 Hun, 484; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *Camp v. Receivers of Niagara Bank*, 2 Paige, 283.

The court, in the administration of funds through a receiver, will see that he is protected against needless annoyance and interference in the discharge of his duties, and that parties willfully embarrassing him are arrested and punished. *Eddy v. Co-Oper. Dress Assoc.* 3 Civ. Pro. 434.

It is proper that a judgment against a receiver, sued as such, have a direction that he pay it "out of any funds which are or may hereafter come into his hands or under the direction of the court applicable to that purpose." *Woodruff v. Jewett*, 37 Hun, 205.

A receiver will only be required to give security for costs where the action has been brought in bad faith or heedlessly, or without reasonable prospects of success. *Hale v. Mason*, 86 Hun, 499, 30 Supp. 789, 67 St. Rep. 535; *Ridgeway v. Symons*, 14 Misc. 78, 35 Supp. 197, 25 Civ. Pro. 23, 69 St. Rep. 552.

It is held, in *People v. Amer. Steam Boiler Ins. Co.*, 14 Misc. 162, that notice to the Attorney-General of an application for an order of reference of a disputed claim against the corporation made upon a stipulation between the claimant and the receiver is not essential to the validity of the order and the proceeding before the referee; aff'd, 3 App. Div. 504.

In *N. Y. & Western Union Tel. Co. v. Jewett*, 115 N. Y. 166, it was held that where a receiver was discharged pending proceedings to compel him to pay the claim of a creditor out of assets in his hands, his discharge was a sufficient ground for denying the application. And where an interlocutory judgment had determined the amount of the plaintiff's claim and the liability of the receiver to pay it, a discharge was held not to be a defense against the entry of final judgment. *Woodruff v. Jewett*, 115 N. Y. 267. In *Miller v. Loeb*, 64 Barb. 454, it was held that the discharge of a receiver was no answer to a motion for leave to bring an action against him for the claim and delivery of the property, the claimants having had no notice of the application to discharge the receiver, he being aware of the claim.

The receiver of an insolvent mutual benefit association obtained permission to levy assessments upon the members of the association in order to pay certain claims which had been presented to him. The order grant-

ing such permission contained a schedule of the contributive amounts alleged to be due from the members, and the receiver was directed, in the event of the failure of any member to pay the amount demanded of him, to take legal proceedings to enforce payment.

Held, that a member of the association from whom such assessment had been demanded, but who had received no notice of the application for the order, was not entitled to have the order vacated, as it was not an adjudication requiring him to pay any sum to the receiver, and did not prevent him from interposing, upon the trial of an action brought by the receiver to enforce payment of the assessment, any defense which he might have thereto. *People v. U. S. Accident Assoc.*, 10 App. Div. 319, 41 Supp. 756.

The plaintiff, a depositor of an insolvent bank, received from the receiver thereof her distributive share of the assets. Thereafter a creditor of the bank suing on behalf of himself and other creditors enforced the statutory liability of the stockholders and recovered a large sum, which was turned over to the receiver for distribution. A referee was appointed to ascertain the creditors of the bank, and was directed to give notice by publication to all creditors to appear and prove their claims. The plaintiff, whose address was known to the bank and the receiver, did not receive a copy of the notice, and knew nothing of the proceedings. After a distribution of part of the fund the plaintiff moved for an order compelling the receiver to pay her her *pro rata* share of the fund. *Held*, that she was entitled to relief on payment of her share of the expenses of the dissolution suit, as she showed a valid excuse for failing to file and prove her claim before the referee; that, as the receiver had been charged with the distribution of the fund, the motion would be regarded as made in the original action by the stockholders for dissolution. *Matter of Ziegler*, 98 App. Div. 117, 90 Supp. 681.

The fact that a decree directs the permanent receiver of a corporation, appointed in an action for its dissolution, to sell its real estate, subject to certain liens specified therein, does not have the effect of divesting the lien of an existing judgment not specified, and until such judgment is satisfied from the moneys in the hands of the receiver it is the right of the owner thereof to proceed to execution and sell the property subject to the order of the court.

There is no statutory authority permitting a receiver, in an action brought by the people to dissolve a corporation on the ground of insolvency, to sell the real estate subject to certain liens, referred to in the final decree, and disregard others that are valid and existing.

The provisions of the Code of Civil Procedure, permitting the sale of lands in partition, free of all liens, are not applicable to the dissolution of corporations on the ground of insolvency. *Matter of Coleman*, 174 N. Y. 373, rev'g 77 App. Div. 496, 78 Supp. 1052.

Where a receiver brings an action or proceeding, it is sufficient to allege that he has been appointed receiver, but where the answer denies the validity of his appointment he is bound to prove it before he can recover. *Matter of O'Connor*, 47 St. Rep. 415, 19 Supp. 971.

If receivers of an insolvent corporation, appointed on its voluntary dissolution, fail to serve the Attorney-General with notice of the application for an order for the sale of the corporate property, such omission is cured by a subsequent order of the court made upon notice to the Attorney-General, confirming such sale, and directing a re-entry, *nunc pro tunc*, of the order authorizing the sale and upon such confirmation the title of the purchaser becomes complete, and it is immaterial whether the stockholders of the corporation have notice of the application for the order of confirmation. *Johnson v. Rayner*, 25 App. Div. 599, 49 Supp. 959, 83 St. Rep. 959, 27 Civ. Pro. 102.

A resident may bring an action, upon a contract made within the State, against a foreign receiver who is regularly in court. *Pruyn v. McCreary*, 105 App. Div. 302, 93 Supp. 995.

Where a receiver is regularly appointed he is vested with all the right and authority of his office, although his former appointment as temporary receiver was illegal. *Matter of Stonebridge*, 37 St. Rep. 617, 13 Supp. 770. A receiver appointed to care for and preserve property during the pendency of an action to settle conflicting claims thereto is a mere stakeholder and should not be permitted to intervene in such a controversy. *Nat. Park Bank v. Goddard*, 48 St. Rep. 744, 20 Supp. 526. The appointment of a successor to the receiver pending an action brought by him does not suspend its prosecution until substitution of the new receiver. The action may be prosecuted in the name of the original plaintiff unless a substitution is applied for. The complaint will not be dismissed in an action brought by the receiver because there was no proof that he had filed a bond, where it appears that the order appointing him required a bond, and that he was subsequently ordered by the court to bring suit on the claim in question. *Hegewisch v. Silver*, 140 N. Y. 414, 55 St. Rep. 808.

An action to set aside transfers made by a judgment debtor cannot be maintained by a receiver whose appointment was invalid, although the complaint is amended so as to set forth subsequent valid appointment, as in such case on cause of action existing at the commencement of the action is shown. *Banigan v. Village of Nyack*, 25 App. Div. 150, 49 Supp. 109, 83 St. Rep. 199.

An order of the court is not necessary in order that the receiver may have authority to sell a claim; it is simply a protection to him against a charge that he has exercised his discretionary power unwisely in so doing. *Higgins v. Herrmann*, 23 App. Div. 420, 48 Supp. 244, 82 St. Rep. 244.

An order authorizing a receiver to take advice of counsel as to a defense is proper. *Troy Savings Bank v. Morrison*, 27 App. Div. 423, 50 Supp. 225, 84 St. Rep. 225.

Where a receiver refuses to receive goods under a contract made by the corporation no title thereto passes to him so as to prevent the vendor from reselling, for the purpose of fixing the amount of damages, without leave of court. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. Rep. 271, rev'g 87 Hun, 334, 34 Supp. 212, 68 St. Rep. 60.

Proof of an agreement by the purchaser to pay the claim of a creditor of the corporation if he abstained from bidding, without any evidence that it was acted upon by the parties or of inadequacy of consideration, is not sufficient to invalidate the sale. *Johnson v. Rayner*, 25 App. Div. 598, 49 Supp. 959, 83 St. Rep. 959, 27 Civ. Pro. 102.

Under sections 827, 1015, 3236, and 3251 of the Code of Civil Procedure, the court has power to provide for the payment out of the funds in a receiver's hands of the fees of the referee who took the testimony and examined the receiver's amount in pursuance of an order of the court *Matter of Merry*, 11 App. Div. 597, 42 Supp. 617.

A Special Term has authority to order the receiver of an insolvent building and loan association to pay the disbursements of a reference ordered to determine the priorities of creditors and stockholders, and the exercise of such authority will not be interfered with by the Appellate Division. *People v. Metropolitan Mut. S. & L. Assoc.*, 103 App. Div. 153, 92 Supp. 689; aff'd on opinion below, 182 N. Y. 531.

A receiver of a bank who has been finally discharged cannot be allowed to intervene in proceedings to reach newly-discovered assets. *Matter of Grand Central Bank*, 27 Misc. 116, 57 Supp. 418.

The receiver of a national bank of another State, appointed by the Comptroller of the Currency, is a foreign receiver, and security for costs can be required of him as a matter of right. *Beckham v. Hague*, 44 App. Div. 146, 60 Supp. 767.

The usage of the Albany Special Term is to allow a receiver to withdraw a gross sum from the general account for current expenses, to be accounted for, instead of obtaining a succession of orders practically *ex parte*. *People v. Manhat. Fire Ins. Co.*, 41 Misc. 611, 85 Supp. 221.

Where a notice of a receiver's sale of an interest in a contingent remainder was not published for the ten days required by rule 77 of the Rules of General Practice, and there was nothing in the notice indicating what was to be sold, or the extent of the interest of the remainder, it was insufficient. *Rawolle v. Kalbfleisch*, 47 Misc. 364, 94 Supp. 16.

Gross inadequacy of price is sufficient ground for setting aside a receiver's sale. *Rawolle v. Kalbfleisch*, 47 Misc. 364, 94 Supp. 16.

Although an order appointing receivers be vacated because it is an improvident exercise of the court's power, it does not follow that the receivers named in the order should receive no compensation. *People v. Oriental Bank*, 129 App. Div. 865, 114 Supp. 440.

The Supreme Court of the State will enjoin a receiver appointed by it in a proceeding to dissolve a domestic corporation from prosecuting in New Jersey an action to determine the ownership of stock of a corporation, and will thus exercise its jurisdiction *in personam* over its receiver by injunction order granted in a pending suit brought by a claimant of the stock, in which all claimants can be made parties and a judgment rendered which will be binding on all parties, whereas a decree of the New Jersey court would not be binding on all. *Guaranty Trust Co. v. Edison United Phonograph Co.*, 128 App. Div. 591, 112 Supp. 929.

COURT OF CLAIMS,

See CLAIMS, BOARD OF.

CRIMINAL CONTEMPTS.

See CONTEMPTS.

CRIME, CARE OF PROPERTY OF PERSON IMPRISONED FOR.

Prison Law §§ 370-375, 390-401.

ARTICLE.

I. CARE OF PROPERTY OF PERSON IMPRISONED FOR LIFE. §§ 370-375, 1002.

- § 370. *Who may apply for appointment of committee, 1002.*
- § 371. *Application for appointment of committee, 1002.*
- § 372. *Payment of debts and application of property, 1003.*
- § 373. *Sale of property, 1003.*
- § 374. *Report of committee; compensation, 1003.*
- § 375. *Proceedings on pardon or commutation of sentence, 1003.*

II. CARE OF PROPERTY OF PERSON CONFINED FOR LESS THAN LIFE. §§ 390-401, 1008.

- § 390. *When and to what court application to be made, 1008.*
- § 391. *Who may apply, 1009.*
- § 392. *Creditor must relinquish security, 1009.*
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The Consolidated Statutes have transferred to the Prison Law, article 15, the provisions contained in the Code with reference to the "Care of the Property of a Person Confined for Crime," §§ 2219-2230.

Code.	Prison Law.	Code.	Prison Law.
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ARTICLE I.

CARE OF PROPERTY OF PERSON IMPRISONED FOR LIFE. Prison Law,

§§ 370-375.

§ 370. *Who may apply for appointment of committee, 1002.*

§ 371. *Application for appointment of committee, 1002.*

§ 372. *Payment of debts and application of property, 1003.*

§ 373. *Sale of property, 1003.*

§ 374. *Report of committee; compensation, 1003.*

§ 375. *Proceedings on pardon or commutation of sentence, 1003.*

§ 370. Who may apply for appointment of committee.

Whenever any person has been convicted and sentenced to imprisonment, in this state for life, the husband, wife, relatives or next of kin or any creditor of such person may apply to the supreme court, at a special term thereof in the judicial district in which said person resided at the time of his conviction, for the appointment of a committee of such person's estate, both real and personal. Source.—L. 1889, chap. 401, § 1.

Consolidators' note. The provisions contained in this article are found in Laws 1889, chap. 401. This statute is an independent act that has not been consolidated heretofore in any general law and illustrates the condition of the distribution of special proceedings. The next article (Art. XV) relates to the care of property of persons confined for less than life and is a special proceeding in the Code of Civil Procedure. Either the article relating to the care of property of persons confined for life should be placed in the Code of Civil Procedure or the proceeding for the care of the property of persons confined for less than life should be placed in the Prison Law. The latter course has been followed. It seemed more appropriate to place both of these proceedings in the Prison Law than to incur the Code of Civil Procedure with an additional special proceeding. It is impossible to gather all the special proceedings in the Code of Civil Procedure as quite as many of them are now in the "General Laws" as in the Code of Civil Procedure. It is better to remove those in the Code of Civil Procedure to appropriate consolidated laws.

§ 371. Application for appointment of committee.

Such application shall be made upon personal notice of not less than twenty days to such convicted person and to the district attorney of the county where the conviction was had, and upon notice to such other persons as would be entitled to notice of application for the probate of the will of such convicted person if he were then dead leaving a will of real and personal property, to be given in like manner as notice of application for such probate. The application shall, among other things, set forth the amount of the property of such person, and the names and residences of his heirs-at-law and next of kin, as near as the same are known or can be ascertained by the applicant. Upon such application and due proof of the service of the notice herein required, the court may, in its discretion, appoint a committee of the estate of such convicted person. The person or persons so appointed as such committee shall file a bond in the county clerk's office of such county, and in such an amount and with such sureties

as the said court shall direct. A copy of the order appointing such committee certified by the clerk of the county in which the order is filed, shall be filed in every county in which any real estate of such convicted person is situated. Source.—L. 1889, chap. 401, § 2.

§ 372. Payment of debts and application of property.

The court shall direct the payment of the debts of such convicted person from said property, and may also in its discretion direct the application of the income, and if need be, of the principal of such property, to the support, education and maintenance of such persons as the said convicted person would be legally liable to support if he had not been so convicted. Or the court may direct the care and preservation of the income and principal of such estate until the natural death of the person so convicted. (L. 1889, chap. 401, § 3.)

§ 373. Sale of property.

The court may from time to time, in the manner prescribed by the code of civil procedure upon the sale of the property of an infant, if it deems it necessary, or that the estate will be benefited thereby, direct the sale of any of the real or personal property by said committee, and the investment of the proceeds of such sale. The court shall control said committee in the performance of his duties; and may from time to time modify and alter its direction or orders in any matter pertaining to the estate. (Source. L. 1889, chap. 401, § 4.)

§ 374. Report of committee; compensation.

The committee so appointed shall annually render an account to the court of his management and of his receipts and disbursements, and transmit a copy thereof to the person so convicted. The court may grant such compensation to the committee as it deems proper, not exceeding, however, the amount that may be allowed to an administrator. (Source. L. 1889, chap. 401, § 5.)

§ 375. Proceedings on pardon or commutation of sentence.

Should said convicted person be pardoned, or his sentence be commuted, the court shall direct the committee to transfer to him after his discharge from prison, all of said property remaining in his hands not lawfully applied or used as herein provided for, and upon the death of such convicted person not pardoned or commuted as aforesaid, the court shall direct the distribution of such property as upon the natural death of a person not convicted. (L. 1889, chap. 401, § 6.)

In *Avery v. Everett*, 110 N. Y. 318, the opinion of Judge Andrews gives a résumé of legislation and of judicial decisions in this State and in England upon the subject of property rights as affected by civil death. It further holds that at common law civil death did not operate to divest the estate of the person convicted, and the language of the Revised Statutes re-enacted in the Penal Code, section 708, providing that a person sentenced to imprisonment for life "shall thereafter be deemed to be civilly dead" is declaratory of and restored the rule of the common law. It seems the statutory provisions regulating the transfer and devolution of property upon the death of the owner refers simply to a natural, actual death.

The fact that a person is civilly dead, in that he is convicted of murder in the second degree and sentenced to State's prison for life, does not make his estate become the subject of administration the same as though he were actually dead, since the provisions of the Code from which surrogates derive their authority to grant letters of administration have no application to civil death but apply only to cases of actual death. The

word "decedent" as used in these sections of the Code was intended to be understood and applied in the usual and ordinary sense of that term as signifying one who has departed from this life. *Matter of Zeph*, 50 Hun, 523, following *Avery v. Everett*, 36 Hun, 6, 110 N. Y. 317.

A petition for the appointment of a committee of the estate of a life convict must show who are the heirs-at-law and next of kin of the convict, and a statement that certain persons mentioned in a petition are his next of kin is insufficient in the absence of a statement of facts showing how the alleged relationship arises.

An unacknowledged and unproved admission of the service of a notice of an application for the appointment of such a committee, purporting to be signed by such convict in the presence of a third person, in the absence of proof of the genuineness, is not due proof of the service of such notice upon him as required by statute.

An unacknowledged and unproved admission of service cannot be read in evidence.

By the appearance of an attorney for a non-resident, a court acquires no jurisdiction of the non-resident if it appears that such appearance was unauthorized, and the statement in the verification of a petition by such attorney that he is authorized to sign the same is insufficient.

Before a court takes possession of the property of a convict, every fact necessary to confer jurisdiction must be established by common-law proof, and the authority of an attorney to act for a non-resident client must be shown by proof which will not disappear upon the death of the attorney. *Matter of Estate of Stephani*, 75 Hun, 188, 26 Supp. 1039.

The appointment of a committee of the estate of one imprisoned for life is properly made under the Laws of 1889, chapter 401, entitled "An act to provide for the care and custody of the estates of persons sentenced to State prison for life," although such convict has been removed to the Dannemora State Hospital, as insane.

Section 2323a of the Code of Civil Procedure, providing for the appointment of the committee of a person committed to a State institution though passed subsequent to said act of 1889, is not inconsistent therewith, nor a repeal thereof, and such proceeding should not be had under said section of the Code of Civil Procedure.

Moreover, a transfer of a convict to the Dannemora Hospital on the certificate of a physician that he is insane is not a judicial determination of his insanity within the meaning of the Code of Civil Procedure.

When a petition of said act of 1889 sets out all the jurisdictional facts required by the statute, and all the persons entitled to such proceeding have had notice thereof and have not appeared, the petition itself is sufficient proof of the jurisdictional facts to warrant the appointment of a

committee. Common-law proof of such facts is not required in such case. *Trust Co. of America v. State Safe Deposit Co.*, 109 App. Div. 665; aff'd, 187 N. Y. 178.

Under the provisions of chapter 401 of the Laws of 1889 the Supreme Court has jurisdiction, upon the application of the persons mentioned therein, to entertain proceedings and direct the appointment of a committee of the estate of a life convict, although the convict before the commencement of the proceedings had become insane and had been transferred to a State hospital for insane convicts; the statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced, whether the convict should thereafter become insane or not and was not repealed by the enactment in 1895 of section 2323a of the Code of Civil Procedure, providing for the appointment of a committee upon the application of a State officer having special jurisdiction over the institution or by the superintendent thereof, "where an incompetent person has been committed to a State institution in any manner provided by law and is an inmate thereof."

Objections that the petition for the appointment of the committee failed to state the age of the petitioner or of any other parties, or whether they or any of them were incompetent cannot be raised by demurrer in an action by the committee to recover the convict's estate, the proceedings having been in a court of general jurisdiction, and, therefore, are not open to a collateral attack in such an action. *Trust Co. of America v. State Deposit Co.*, 187 N. Y. 178, aff'g 109 App. Div. 665.

Precedent in Proceeding for Appointment of a Committee of the Estate of Person Imprisoned for Life. These Papers were Held to be in Substantial Compliance with all the Requirements of Chapter 401 of the Laws of 1889, in an Action Brought by the Committee of the Imprisoned Person to Recover Property Belonging to Him, but Held by a Safe Deposit Company (*Trust Co. of America v. State Deposit Co.*, 187 N. Y. 178, 181).

Petition for Appointment of Committee.

SUPREME COURT — COUNTY OF NEW YORK.

IN THE MATTER OF THE APPLICATION OF
CHARLES J. STEPHANI FOR THE AP-
POINTMENT OF A COMMITTEE OF THE
ESTATE OF ALPHONSE J. STEPHANI, A
LIFE CONVICT, UNDER THE PROVISIONS OF
CHAPTER 401, LAWS OF 1889.

To the Supreme Court of the County and State of New York:

The petition of Charles J. Stephani respectfully shows to this court:

1. That your petitioner is over twenty-one years of age and of sound mind; that he resides at No. 90 Adlerflychtplatz, in the city of Frankfort-on-the-Main, Germany; that he is the uncle of Alphonse J. Stephani, a life convict, serving a sentence in the State prison of New York; and that he is informed

and verily believes that he is the sole legatee under the last will and testament of said Alphonse J. Stephani.

2. That the said Alphonse J. Stephani, being at that time a resident of the county of New York, was, on the 10th day of April, 1891, sentenced to imprisonment for life by the Court of Oyer and Terminer in the county of New York, upon a conviction for murder in the second degree; that he is confined under the said judgment and is at present in the State Hospital asylum, Clinton prison, Dannemora, N. Y.

3. That the said Alphonse J. Stephani has certain personal property in the State of New York, the exact amount of which your petitioner cannot now state, as it depends upon the result of proceedings now pending for the settlement of the estates of Josephine Stephani, the mother, and of Carl Louis Alphonse Stephani, the father, of said Alphonse J. Stephani; but that the value thereof, to the best of your petitioner's information, knowledge and belief, will not be less than twenty-five thousand dollars (\$25,000) nor more than one hundred thousand dollars (\$100,000); that the said Alphonse J. Stephani owns no real estate within the State of New York, to the best of your petitioner's knowledge, information and belief.

4. That the father of said Alphonse J. Stephani died on or about November 19, 1888; that the mother of said Alphonse J. Stephani died on or about April 20, 1902; that the said Alphonse J. Stephani is unmarried and has no brothers or sisters, and no descendants of deceased brothers or sisters, and that his only next of kin and heirs-at-law, with their degree of relationship and places of residence, are as follows: (Insert names, degree of relationship and residences. The petition should also state the age of the next of kin and heirs-at-law or, at least, whether they are of full age, or minors over or under fourteen years of age, and that they are competent, and if any are incompetent persons that should also be stated).

5. That the appointment of a committee of the estate of said Alphonse J. Stephani is necessary for the care, custody and preservation thereof; and that the Trust Company of America is a proper and suitable person to be appointed as such committee; that no committee of the estate of said Alphonse J. Stephani has been appointed in this State, or elsewhere, to the knowledge of your petitioner, except that heretofore, and on the 8th day of November, 1893, an order was made appointing the Farmers' Loan & Trust Company committee of the estate of said Alphonse J. Stephani, a life convict, which appointment was vacated by the General Term of the Supreme Court by reason of technical defects in the proceeding, as reported in 75 Hun, page 188; and that there is not now a committee of the estate of said Alphonse J. Stephani.

WHEREFORE, your petitioner prays that an order may be made citing and requiring the said Alphonse J. Stephani and the said Emma Grossman, Louise von Holbach, Emma G. von Glaubitz, Friedrich Lenning, Marie Hill, Sophie Leith and Maria Lawrence and the district attorney of New York county to show cause, at a Special Term of this court, at a time therein stated, why the Trust Company of America or some other suitable person or corporation should not be appointed as committee of the estate of said Alphonse J. Stephani, as provided by chapter 401, Laws of 1889, and why the petitioner should not have the costs of this proceeding and such other and further relief as may be just and equitable.

CHARLES J. STEPHANI,
Petitioner.

(Add verification.)

(Here follows copy of judgment of conviction by the court, and duly executed and verified waivers by several of the next of kin and heirs-at-law of said life convict, duly waiving the issuance of a citation or any other notice of the application herein, and consenting that the prayer of the petition be granted.)

(Same title.)

Order to Show Cause.

Charles J. Stephani, of Frankfort, Germany, having duly presented his duly verified petition, bearing date June 27, 1903, in which he alleges that Alphonse J. Stephani is a life convict, serving a sentence in the State prison at New York, at present confined in the State Hospital asylum, Clinton prison, Dannemora, N. Y.; that he has personal property within the State of New York which requires the appointment of a committee for the care, custody and preservation thereof, and praying for the appointment of the Trust Company of America, or some other suitable person or corporation as such committee, under the provisions of chapter 401, Laws of 1889, and that the only next of kin and heir-at-law of said Alphonse J. Stephani, are the petitioner, Charles J. Stephani, an uncle (insert names, degree of relationship and residences); and the aforesaid next of kin and heirs-at-law (naming them) having presented their duly executed waivers, waiving issuance and service upon them of a citation or any other notice of the application herein, and consenting that the prayer of the petitioner be granted;

Now, on motion of Carter, Hughes, Rounds & Schurman, attorneys for the petitioner, Charles J. Stephani, it is hereby

Ordered, that Alphonse J. Stephani, Hon. William Travers Jerome, district attorney of the county of New York, and the said Mrs. Maria Hill show cause at a Special Term of this court, to be held at Part I thereof, in the County Court House, in the county of New York, on the 18th day of November, 1903, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made as prayed for in the petition, appointing the Trust Company of America or some other suitable person or corporation as committee of the estate of said Alphonse J. Stephani, as provided by chapter 401, Laws of 1889, and why the petitioner should not have the costs of this proceeding and such other and further relief as may be just and equitable; and it is further

Ordered, that notice of this application be given by serving upon the said Alphonse J. Stephani and William Travers Jerome, district attorney, and each of them personally, a copy of this order and of the petition of Charles J. Stephani not less than twenty days prior to the return day of this order, and that such service so made shall be deemed sufficient; and it further appearing from the petition herein that the said Marie Hill resides at 3 Lindenstrasse, Frankfort, Germany, and that service of this order cannot with due diligence be made upon her within the State of New York; it is further

Ordered, that notice of this application be given to the said Mrs. Marie Hill by publishing a copy of this order in two newspapers, to wit, in *The New York Law Journal*, published in the county of New York, and in the *New York Times*, published in the county of New York, once a week for six successive weeks, or at the option of the petitioner, by serving a copy of this order and of the said petition without the State upon the said Mrs. Marie Hill, personally, and that on or before the date of the first publication, as aforesaid, the petitioner deposit in the general post-office, in the city of New York, a copy of this order and of the said petition, contained in a securely closed postpaid wrapper, directed to the said Mrs. Marie Hill, at 3 Lindenstrasse, Frankfort, Germany.

New York, *September 16, 1903.*

JOHN PROCTOR CLARKE,

Justice of the Supreme Court of the State of New York.

(Here followed proofs of service, of the foregoing petition and order to show cause, upon the district attorney of New York county and upon all the next of kin and heirs-at-law of said life convict, except those who had duly waived notice and consent to appointment by proposed trustees.)

Order Appointing Committee.

(Caption and title.)

(Recitals.)

Ordered, that the petition of the petitioner, Charles J. Stephani, be, and the same hereby is, in all respects, granted and allowed; and it is further

Ordered, that The Trust Company of America, a corporation duly organized under the laws of the State of New York, and having its principal office at No. 149 Broadway, in the borough of Manhattan, city of New York, be, and the same hereby is, appointed the committee of the estate of Alphonse J. Stephani, a life convict, under the provisions of chapter 401, Laws of 1889, with all the rights, powers and duties of a committee, as provided by law; and it appearing that the said The Trust Company of America is organized under the Banking Law (chapter 689, Laws of 1892) of the State of New York, the filing of a bond is hereby dispensed with in accordance with the provisions of section 158, chapter 689, Laws of 1892; and it is further

Ordered, that the said The Trust Company of America, as such committee, be, and the same hereby is, directed and authorized to take into its possession all of the personal property of said Alphonse J. Stephani, and to apply so much of the income of the property of said Alphonse J. Stephani, as in his judgment may be necessary or expedient to supply said Alphonse J. Stephani from time to time with such necessities of life as may be required for his comfort and be not inconsistent with the regulations of the State prison in which he is confined; and it is further

Ordered, that the petitioner herein, Charles J. Stephani, be allowed the sum of five hundred dollars (\$500) for his costs and counsel fees in this proceeding, payable out of the property of the said Alphonse J. Stephani, and the committee herein appointed, The Trust Company of America, is authorized and directed to pay the said amount of costs to the petitioner or his attorneys out of the property of the life convict, Alphonse J. Stephani, which may come into his possession; and it is further

Ordered, that the said committee, The Trust Company of America, or any other party to this proceeding, may at any time apply at the foot of this judgment for the further directions of the court.

Enter:

FRANCIS M. SCOTT.

J. S. C.

ARTICLE II.**CARE OF PROPERTY OF PERSON CONFINED FOR LESS THAN LIFE. Prison Law, §§ 390-401.**

- § 390. *When and to what court application to be made*, 1008.
- § 391. *Who may apply*, 1009.
- § 392. *Creditor must relinquish security*, 1009.
- § 393. *Contents of petition*, 1009.
- § 394. *Copy of sentence and affidavit to be presented*, 1009.
- § 395. *Proceedings upon presentation of the papers*, 1009.
- § 396. *Proceedings*, 1009.
- § 397. *Effect of order appointing trustee*, 1010.
- § 398. *Removal of trustee; appointment of new trustee*, 1010.
- § 399. *Prisoner's property; how appointed*, 1010.
- § 400. *Prisoner's property; to be delivered to him on his discharge*, 1010.
- § 401. *Application of this article to persons heretofore sentenced*, 1010.

§ 390 (Formerly Code, § 2219). When and to what court application to be made.

Where a person is imprisoned in a State prison, for a term less than for life; or in a penitentiary or county jail, for a criminal offense, for a longer term than one year; one or more trustees, to take charge of his property, may be appointed, as prescribed in this article, by the county court of the county, or the supreme court in the judi-

cial district, where he resided at the time of his imprisonment; or, if he was not then a resident of the State, where he is imprisoned.

Consolidators' note. This is a proceeding from the Code of Civil Procedure. The comments in note to section 370 made on article 14 apply to this article.

§ 391 (Formerly Code, § 2220). Who may apply.

A petition for such an appointment may be presented by either of the following persons:

1. A creditor of the prisoner.
2. The prisoner's husband, wife, or child.
3. One or more of his next of kin, or, where he owns real property, of his heirs presumptive.
4. A relative whom he is bound to support.
5. Any relative or other person, in behalf of his infant child or children.

§ 392 (Formerly Code, § 2221). Creditor must relinquish security.

A creditor of the prisoner, who has a judgment, mortgage, or other security, specified in section fifty-nine of the Debtor and Creditor Law, cannot apply for such an appointment, with respect to the debt so secured, unless he appends to or includes in his petition, the declaration, required by that section from a consenting creditor; which declaration has the same effect as a declaration of a consenting creditor, as therein specified.

§ 393 (Formerly Code, § 2222). Contents of petition.

The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein stated are true, to the best of the petitioner's knowledge and belief. It must set forth the facts, showing that the applicant is entitled to make the application, and that the application is made to the proper court; the name and residence of each person, who is entitled to make such an application, as prescribed in the last section but one, except the fifth subdivision thereof; and a brief description of the property, real and personal, of the prisoner, and the value thereof. If the applicant is a creditor, and not a resident of the State, he must annex to his petition, the papers specified in section 62 of the debtor and creditor law. If any of the facts, herein required to be set forth, cannot be ascertained by the petitioner, after the exercise of due diligence, that fact must be stated; and the court may, in its discretion, issue a subpoena, requiring any person to attend and testify, respecting any matter, which, in its opinion, ought to be more fully and certainly set forth.

§ 394 (Formerly Code, § 2223). Copy of sentence and affidavit to be presented.

The petition must be accompanied with a copy of the sentence of conviction of the prisoner, duly certified by the clerk of the court by which he was sentenced under the seal thereof; together with an affidavit of the applicant, stating that the person so convicted is actually imprisoned thereunder.

§ 395 (Formerly Code, § 2224). Proceedings upon presentation of the papers.

Upon the presentation of the papers, the court may, in its discretion, make an order, either appointing one or more fit persons trustees of the property of the prisoner; or requiring all creditors of the prisoner, and all persons interested in his estate, to show cause, at a time and place specified therein, why such an appointment should not be made. In the latter case, the order must direct the manner of service thereof, by publication or otherwise.

§ 396 (Formerly Code, § 2225). Proceedings on return of order to show cause.

Upon the return of an order to show cause, made as prescribed in the last section, proof of the service thereof, as required thereby, must first be made; whereupon the court must hear the allegations and proofs of the creditors and other persons interested in the estate, who appear. Where the prisoner is indebted to any person, the court must appoint one or more trustees, unless the persons interested in the prisoner's property pay the debt, or give such security, as the court prescribes, for the payment thereof, either absolutely, or contingently upon a recovery in an action; in which case,

or where the prisoner is not indebted, the court may grant or deny the prayer of the petition, as justice requires.

§ 397 (Formerly Code, § 2226). Effect of order appointing trustee.

The entry of the order, appointing one or more trustees, and the filing of the papers upon which it was granted, vest in the trustee or trustees all the right, title, and interest of the prisoner, in and to any property, real or personal. Where the prisoner owns real property, an exemplified copy of the order must be recorded in the proper office for recording deeds, in each county where the real property is situated.

§ 398 (Formerly Code, § 2227). Removal of trustee; appointment of new trustee.

Upon the application of any person entitled to apply for an order, appointing trustees of the prisoner's property, and upon such a notice as the court prescribes, to the petitioner, and to such other persons interested, as the court thinks proper to designate, the court, by which the order was granted, may, in its discretion, remove any trustee, and appoint another in his place; or may appoint one or more additional trustees. The new trustee or trustees, so appointed, have the same power and authority, are vested with the same right, title, and interest, and are subject to the same duties and liabilities, as if he or they had been appointed by the original order.

§ 399 (Formerly Code, § 2228). Prisoner's property; how applied.

After deducting their commissions and expenses, allowed by law, and paying the prisoner's debts, the trustees may, from time to time, under the direction of the court by which they were appointed, apply the surplus of any money in their hands, to the support of the prisoner's wife and children, and of such other relatives as he is bound to support, and to the education of his children.

§ 400 (Formerly Code, § 2229). Prisoner's property to be delivered to him on his discharge.

When the prisoner dies, or is lawfully discharged from imprisonment, the trustee or trustees must deliver over to him, or to his legal representatives, all his property, remaining in their hands, after deducting therefrom their lawful expenses and commissions.

§ 401 (Formerly Code, § 2230). Application of this article to persons heretofore sentenced.

This article applies to a prisoner who has been sentenced before this chapter takes effect, and to his property; except where one or more trustees of his property have been theretofore appointed, by proceedings taken in pursuance of a statute then in force.

